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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1021~~ 142

JAY LEE GIBSON, *Petitioner*

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Texas

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PETITION FOR WRIT OF CERTIORARI
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To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Supreme Court of Texas in the above case. In this behalf, Petitioner shows unto the Court:

Opinion of the Court Below

The opinion of the Court of Civil Appeals affirming the trial court's judgment in favor of Petitioner appears at 290 S.W. 2d 305 (Appendix A) (R. 6). The opinion

of the Supreme Court of Texas reversing the judgments of the trial court and of the Court of Civil Appeals is not yet reported in the official reports, but it appears at 298 S.W. 2d 97 in the unofficial reports and is set out verbatim in the Appendix hereto. (Appendix B) (R. 15).

Statement of Grounds On Which Jurisdiction of This Court Is Invoked

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, *U. S Code*, Sec. 1257(3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Judgment of the Supreme Court of Texas, sought to be reviewed, was entered on the 23rd day of January, 1957 (R. 18) and is set out in Appendix C.

Thereafter, on the 7th day of February, 1957, the Petitioner filed a Motion for Rehearing. Thereafter, on the 27th day of February, 1957, the Supreme Court of Texas overruled the Petitioner's Motion for Rehearing. The Order Overruling said Motion for Rehearing is contained in Appendix D (R. 18).

Thereafter, on the 13th day of March, 1957, the Petitioner sought permission to file his Second Motion for Rehearing. Thereafter, on the 3rd day of April, 1957, the Supreme Court of Texas refused permission to file the Petitioner's Second Motion for Rehearing.

It is claimed that the decision of the state court under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 *U.S. Code*, Sections 51-60 is not in accord with applicable decisions of this Court.

Questions Presented

It being stipulated that at all times material herein the Petitioner's duties as an employee of the Respondent were in furtherance of the interstate commerce transportation business of Respondent (S.F. 3-4), the Petitioner and the Respondent were at all times engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 *U.S. Code*, Secs. 51-60, the questions presented for review are:

(A) Whether the Petitioner was entitled to have the question of negligence decided in conformity with the concept of negligence as formulated and applied by the Federal decisional law rather than by the concept of negligence as developed by the Texas State Courts deciding cases involving purely local questions of negligence.

(B) Whether the Petitioner was entitled to have the jury, rather than the reviewing court, weigh the contradictory evidences and inferences and decide whether it was negligence to require one class of employees to cross the railroad yards over twisting, sliding gravel which varied from two to five inches diameter in size (S.F. 194) spread a foot or more deep (S.F. 19, 303) when the evidence revealed that: (1) another class of employees had been provided with a safe surface on which to walk by a simple, inexpensive method (S.F. 139); (2) the gravel used in the subject railroad yard conformed to neither the situation as it existed in other yards (S.F. 78, 138, 151) nor to

the specifications under which this yard was built (S.F. 301, 313, 194); (3) the situation had persisted for six months (S.F. 137) and no efforts had been made to tamp down the gravel in the yard (S.F. 144-145) though several people had fallen in it (S.F. 137, 146, 201).

(C) Does a state court invade the province of a jury and violate the scope of appellate review in a Federal Employers' Liability Act case by setting aside the jury verdict and searching the record for conflicting circumstantial evidence and inferences rather than limiting their review to the single inquiry of whether the negligence of the employer played any part in the injury.

Statutes Involved

The statutes involved are:

28 U. S. Code, Sec. 1357 (3) (Appendix E).
45 U. S. Code, Sec. 51 (Appendix F).
45 U. S. Code, Sec. 53 (Appendix G).
45 U. S. Code, Sec. 54 (Appendix H).
45 U. S. Code, Sec. 56 (Appendix I).

Statement of Material Facts

This action was brought by Petitioner, an engineer in the employ of Respondent, under the Federal Employers' Liability Act, 45 *U. S. Code*, Secs. 51-60, to recover damages for injuries suffered as a result of the alleged negligence of his employer. It was stipulated that at all times material herein the Petitioner's duties as an employee of the Respondent were in furtherance of the interstate commerce transportation business of Respondent (S.F. 3-4).

On December 7, 1950, Settegast Railroad Yards in Houston, Texas, had been open for five or six months (S.F. 13). The Yards had been designed as a freight terminal under the American Railway Engineering Association specifications and practice which require that the ballast used to cover the yards be pit run gravel ballast that will pass through a two-inch screen (S.F. 301, 313). However, all the gravel was not screened and only samples were checked (S.F. 303, 307). There was a wealth of testimony that the gravel ballast actually used to cover the Yards at Settegast was not gravel that would meet those two-inch screen specifications, but that the size of the gravel actually ranged from pea size up to four or five inches in diameter (S.F. 194). There was testimony that some of this gravel was "as big as a man's fist" (S.F. 145, 157), or "as big as hen's eggs or bigger" (S.F. 96). Because of these rocks, inspectors at Settegast called the yards "coal hill" (S.F. 194). It was not the size of gravel used in other yards (S.F. 139).

In the construction of the Settegast Yards, gravel was laid down over the entire yard (S.F. 308). It was a foot deep in most places, maybe heavier in others (S.F. 19, 303). There was uncontroverted evidence that no effort had been made to tamp or pack the gravel down except between the rails (S.F. 19, 144, 155, 304). In the six months since it had been laid, the gravel hadn't packed any, but was about the same (S.F. 144-145).

Several people had lost their footing on the gravel and fallen since the Yards were opened six months before Petitioner sustained his injuries (S.F. 137, 146, 201). The large rocks would sink, twist and slide as they were stepped on causing footing to be insecure and walking hazardous; the foot would not be square as it ordinarily is when

walking (S.F. 309). As Respondent's employees at Settegast Yards walked through the yard, they would take a step and slip (S.F. 194, 309) as the wide range of sizes of the gravel and the looseness of the gravel created a "pretty dangerous proposition" because when you stepped on the gravel it would go in all directions and "you fall if you're not careful" (S.F. 136-137). The gravel was rolling and hard to walk in (S.F. 19, 20, 96, 150, 194). Even one of Respondent's witnesses testified that it was very possible to slip and fall (S.F. 322). Everybody that customarily walked in the Yard dreaded walking across it (S.F. 157).

Witnesses who had had years of experience around railroad yards testified that this situation was not present in other yards (S.F. 78, 138, 151). Pat O'Connell, a locomotive engineer, who had been railroading about forty-five or forty-six years, and who had been in the employ of the Defendant for thirteen years (S.F. 133) testified that in his forty-five years of railroading he had been in and out of about one hundred railroad yards and that this condition did not exist in the other yards. Settegast Yards was the worst he had ever seen (S.F. 138).

Petitioner, a locomotive engineer, had been operating freight trains on a run in and out of Settegast Yards in Houston since its opening (S.F. 14), and he had come to dread walking across the yards (S.F. 19). The dangerous propensities of the heavily graveled yard were heightened by a peculiar situation that existed at Settegast Yards. The usual arrangement in such yards is for the engineer to move the engine out of the roundhouse, but by contract agreement between Settegast Yards and the hostler for the benefit of the hostlers, the locomotive engineers who were

to take the trains out of Settegast Yards were not permitted to move the train from the roundhouse to the place where the freight train was made up; this was done by hostlers (S.F. 20, 140, 150, 347). After arriving at the roundhouse on the west end of the yard where the locomotive would be in the usual situation, it was necessary for the Petitioner and other engineers to walk from there completely across "A" yard, "B" yard and into "C" yard, a distance of about 900 feet, to the place where Petitioner's train was customarily spotted (S.F. 135, 149). No provisions were made for the Petitioner to get across to his engine in safety; there were no walkways and no transportation across this gravel was provided (S.F. 156). Petitioner and some of the other engineers would usually try to get to work early enough to catch the engine at the roundhouse and ride it out to the yards in order to avoid the walk over the gravel (S.F. 19-20; 348). On some occasions the Petitioner had even paid one of the switchmen to drive him over to his train (S.F. 51).

Provisions were made for another class of employees to walk across the yards in safety. About 7,600 feet of leads were covered with sand and cement so that the switchmen could have a place to walk without danger of falling (S.F. 139). These walk-ways were provided by spreading cover sand which had cement in it and normal moisture would set up a crust about an inch and one-half thick (S.F. 310, 312-313). But there was no pathway provided for the engineers, nor were any other provisions made for transferring engineers to Yard "C" where Petitioner picked up his train, though there was nothing to prevent the Defendant from providing a path from the round-house to where the engine was spotted (S.F. 140). C. R. Dubose,

the resident engineer on the construction of Settegast Yards, testifying for the Respondent said:

"Q. Were you aware, in the building of Settegast Yards, that engineers would have to walk from the roundhouse to "C" Yard?
A. I don't think that was discussed, as to how they would get from the roundhouse to their locomotive.
Q. That was never discussed?
A. I don't remember that being in any of our plans that we made. *I thought there would be provisions made for them to walk over there.*" (S.F. 311) (Emphasis added).

On December 5, 1950, the Petitioner was called to take a freight train out (S.F. 10). It was night and though there were lights, box cars threw shadows over the ground (S.F. 57). This being a switching yard, Petitioner could not devote his full attention to the ground before him, but had to keep his eyes on the switching operations as he crossed the many sets of tracks in Settegast Yards. While walking from the roundhouse to his engine, his foot slipped on the gravel and he fell across the tracks, suffering serious injuries (S.F. 27). Plaintiff was in good health before the accident, but there was expert medical testimony that in reasonable medical probability he will never be able to return to work (S.F. 175).

After hearing these facts and in answer to special issues submitted to them, the jury found that the Defendant was negligent in failing to use gravel of uniform size and in failing to pack the gravel which was used about and between the railroad tracks, in requiring Plaintiff to walk from the roundhouse across the Yard to his engine under

the circumstances existing, and in failing to provide a smooth walk-way or path from the roundhouse across the Yards to where the engine was "spotted". The trial court entered judgment based on those findings. Against the contentions that the evidence was insufficient to support these findings the Court of Civil Appeals affirmed the jury verdict. 290 S.W. 2d 305. (Appendix A, R. 6). On appeal to the Supreme Court of Texas, that Court reversed and rendered judgment for Respondent holding there was no evidence of negligence.

Reasons for Granting the Writ

1. *The State Court by its decision and judgment in this Cause denied Petitioner a right specially set up and claimed by him under the Federal Employers' Liability Act: the right to have the question of negligence or non-negligence tested under the Federal statutes as interpreted by the decision of this Honorable Court.* (R. 12).

The rights asserted by Petitioner in this cause were Federal rights given him by Federal statute, and protected by federal rather than local rules of law. *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; L.R.A. 1915C, 1; Ann. Cas. 1915B, 475. In enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress did not intend that varying conceptions of negligence or the lack of negligence would give a right of recovery to an injured employee in one state and deny it to an employee in another state where the type of employment, the employer and the type of injury are all substantially the same. The principle was clearly stated by this Honorable Court in

Urie v. Thompson, 337 U.S. 163, 174; 69 S. Ct. 1018, 1027; 93 L. Ed. 1282:

> ". . . what constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs".

Earlier, this Honorable Court had said:

> "The kind or amount of evidence required to establish it (negligence) is not subject to the control of the several states". *Chicago Milwaukee & St. Paul Railway Company v. Coogan*, 271 U.S. 472, 474; 46 S. Ct. 564, 70 L. Ed. 1041.

Yet, in plain contravention of this controlling principle, the Supreme Court of Texas has held in the present case that it will not follow the Federal decisions in determining the question of negligence, but will follow state law, saying:

> ". . . this Court in determining the question of no evidence reserves the right to appraise the evidence in accordance with the concept of negligence announced by this Court in prior cases." (Appendix B, p. 29).

In refusing to follow Federal decisional law formulating the concept of negligence and in applying a concept of negligence developed from state decisional law, the Supreme Court of Texas reached the very result sought to be avoided—the existence of a cause of action made dependent upon the jurisdiction where the injury occurred.

This Honorable Court recently allowed recovery in the case of *Webb v. Illinois Central Railroad Co.*, 352 U.S.—,

77 S. Ct. 451; 1 L. Ed. 2d 503, reversing the Court of Appeals for the Seventh Circuit which had reversed a judgment rendered on a jury's verdict on the ground that there was no evidence of negligence. The facts are strikingly similar to the facts in Petitioner's case. There, too, the specifications called for two-inch gravel and a rock "about the size of a man's fist" caused the Petitioner to fall. The only material difference in the facts is that in the *Webb* case there was only one large rock and in the present case there were many, and in the *Webb* case the rock had been there for about three weeks while in the present case the rocks had been present for six months. The anomalous result is that, although injured under substantially the same circumstances, employees engaged in interstate commerce and so injured are protected in Illinois, but they are not protected in Texas. This is not the result that Congress intended.

Petitioner respectfully submits that the Supreme Court of Texas was in error in applying the State decisions in testing the question of no evidence of negligence. In determining whether or not Respondent had furnished Petitioner with a safe place to work, the Supreme Court of Texas should have applied Federal principles and decisions.

2. *The State Court by its decision and judgment in this cause denied Petitioner a right specially set up and claimed by him under the Federal Employers' Liability Act: the right to have the reviewing court view the evidence supporting Petitioner's allegations of negligence ignoring all contradictory evidence and inferences.* (R. 12).

In recent years this Court has, on many occasions, expressed itself clearly regarding the respective functions of

the Court and the jury, and the scope of appellate review in cases arising under the Federal Employers' Liability Act.

These decisions include *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1942); *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350 (1942); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1945); *Ellis v. Union P. R. Co.*, 329 U.S. 649 (1947); *Myers v. Reading R. Co.*, 331 U.S. 477 (1947); *Wilkerson v. McCarthy*, 336 U.S. 53 (1948); and *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407 (1953).

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidences and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very sense of this function is to select from among conflicting inferences and conclusions that which it considers reasonable. . . . That conclusion, whether it relates to negligence, causation or any other factual matter, canot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29; 64 S. Ct. 409, 412; 88 L. Ed. 520."

More recently, this Court said in *Webb v. Illinois Central Railroad Co.*, 352 U.S.——; 77 S. Ct. 451; 1 L. Ed.

2d 503, and *Rodgers v. Missouri Pacific Railroad Co.*, 352 U.S.——; 77 S. Ct. 443; 1 L. Ed. 2d 493; in opinions handed down February 25, 1957:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in *part*' (to its) negligence."

The plain duty imposed by these decisions and many similar ones is that the reviewing court look only to the evidence supporting the jury's findings, ignoring all conflicting evidence and inferences, to determine if there is a reasonable basis for the jury's verdict.

The State Court failed in controlling instances to so review the evidence:

A. Though the specifications under which Settegast Yards were built called for two-inch gravel, there was a wealth of evidence that larger gravel was used. (S.F. 96, 145, 157, 194, 303). The State Court failed to mention or consider

this evidence which was favorable to the jury's findings of negligence, but on the contrary apparently relied on inferences based on the fact that American Railway Engineering Association specifications were used in the construction of this Yard when it gave as one reason for its finding of no negligence:

> "We hold that there is no evidence to warrant a finding that Petitioner (Respondent) was guilty of any breach of duty owed to Respondent (Petitioner) with respect to the method and manner and material used in the construction of Settegast Yards. Petitioner in building the yards in question was using plans and specifications advanced and approved by the best qualified construction engineers in America." (Appendix B, p. 29).

The State Court completely ignored evidence that those plans called for two-inch gravel and that gravel of much larger dimensions was actually used.

Petitioner urges that the State Court was not considering the evidence most favorable to the findings of the jury when it failed to consider this evidence in its decision.

B. The State Court stated that it was a fair deduction to say that all railroad yards were originally constructed by the use of loose gravel, and that the element of time was responsible for the fact that a portion of the gravel became packed. The deduction is just as fair, from the evidence in the record, that they were not originally constructed of loose gravel. There was testimony from a man who had been around a hundred or more railroad yards in his 45 years' experience and who must have seen other new yards in that time that he had never seen a condition like it (S.F. 138).

Another inference, just as fair, is that the other yards had tamped down the gravel spread over their yards. There was evidence that portions of Settegast Yards had been tamped down (S.F. 19, 144, 155, 304). Again the testimony of the witness who stated he had been in over 100 yards during his 45 years' experience would add support to that theory.

Still another inference, just as fair, is that the other yards were actually constructed with two-inch gravel according to American Railway Engineering Association specifications. There was direct testimony in the record that American Railway Engineering Association specifications called for two-inch gravel (S.F. 303).

The choice of the inference to draw was within the province of the jury. The State Court was required by the Federal decisions to give effect to and sustain the choice made by the jury.

C. One of the most telling pieces of evidence sustaining the jury's finding of negligence, and probably one on which the jury relied heavily, was not even considered by the State Court in its decision though it was forcibly called to that Court's attention in Petitioner's briefs to that Court.

The resident engineer on the construction of Settegast Yards, speaking of the absence of any kind of surfaced area on which the engineers could walk to their engines, testified that "I thought there would be provisions made for them to walk over there". (S.F. 311). He also testified that walk-ways had been provided for switchmen by the simple expedient of spreading cover sand and allowing normal moisture to set up a crust (S.F. 310, 312, 313). The jury could have determined that this would not have been done if the situation were not dangerous, or if rail-

road yards customarily waited for time to cause the gravel to settle.

D. The State Court in holding that there was no evidence of negligence relied heavily upon the fact that plans and specifications of the American Railway Engineering Association were used in the construction of Settegast Yards. In so considering these plans and specifications, the Court failed to consider the evidence most favorably to Petitioner, but rather it weighed conflicting evidence and resolved the contradictions in favor of Respondent.

The record reveals that the A.R.E.A. specifications were general plans, not tailored to any particular yard, but designed as general guides. There was testimony that the situation at Settegast Yards was not such as was generally encountered, but was peculiar to Settegast Yards, because at Settegast the engineers picked up their engines in the yard rather than at the roundhouse (S.F. 22, 140, 150, 347). There is nothing in the record to show that the plans and specifications of the A.R.E.A. had such a situation in mind. Add to this the fact that this walk was over gravel *not* in conformity with A.R.E.A. specifications. Surely, the jury could reason that these two facts deprived the use of A.R.E.A. specifications as grounds for an absence of negligence.

Further, the record affirmatively reveals that the plans of the A.R.E.A. were found wanting. Approximately 7,600 feet of leads were surfaced by a simple and convenient method, thus covering the gravel and giving one class of employees, the switchmen, a safe place to work (S.F. 312) while another class of employees were left to shift for themselves. Suppose there had been only one switchman and a large group of engineers, would the result have been different? Or suppose that the surfaced pathway had been provided for the engineers rather than

the switchmen. Could a similarly injured switchman sustain a verdict based on the negligence of the respondent? In short, is one class of employees to be favored over another class of employees in the provision of a safe place to work?

Petitioner urges that these facts and circumstances demonstrate that the A.R.E.A. plans and specifications were not a factor to be considered in arriving at a decision that the defendant was free from negligence.

E. The State Court's second ground for holding "no evidence of negligence" was:

> "We hold that the evidence wholly fails to produce any reason for petitioner (respondent here) to anticipate injury to an employee who could as the respondent give his undivided attention to walking." (Appendix B, page 29).

With respect to this reasoning, the jury could, and probably did, reason that since the Respondent had surfaced approximately 7,600 feet of leads for the switchmen to walk on, he must of done it for some reason. They could at least infer that it was surfaced to give the switchmen a firm footing. This would seem to be sufficient grounds on which to base anticipation of injury.

The State Court's statement that there was no evidence that anyone had ever made any complaint to Respondent regarding the condition of the yard and that there was no evidence that Respondent had knowledge that anyone had ever fallen while working in the yard is not determinative of the question as the jury could have reasoned from the facts before it that the Respondent, in the exercise of due care, should have known that he was not adequately protecting Petitioner and similarly situated employees. In

Chicago Great Western Railway Company v. Guy P. Smith, 8th Cir., 228 F. 2d 180, the jury had found that a walkway as originally constructed was not a reasonably safe, sufficient and proper walkway. It had been in existence for six months just as Settegast Yards had been in existence for six months at the time of the accident. In both cases, the condition had existed from the time of the construction of the facility. The court rejected a contention that the Defendant could not be charged with negligence due to his lack of notice by quoting from *Urie v. Thompson*, 337 U.S. 163; 178; 69 S. Ct. 1018, 1028; 93 L. Ed. 1282, where this Court stated:

> ". . . negligence, within the meaning of the Federal Employers' Liability Act, attached if respondent knew or by the exercise of due care should have known, that prevalent standards of conduct were inadequate to protect Petitioner and similarly situated employees . . ."

And in *Beattie v. Elgin, Joliet and Eastern Railway Co.*, 7th Cir., 217 F. 2d 863, at page 866, the court said:

> ". . . Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was chargeable with knowledge of the conditions which existed there from time to time which in the exercise of due care it could have ascertained."

Reasoning as it did, the State Court was indulging an inference contra to the jury findings in plain contradiction of the principles to be applied in a case brought under F.E.L.A.

F. The State Court stated further:

> "It is true that the record shows that one witness testified that he fell while stepping on a rail, and another testified as to stumbling and falling, but we

regard such evidence as not controlling since they involve different factual situations." (Appendix B, page 29).

Petitioner submits that this was an inference within the province of the jury and that the State Court should have given controlling weight to the inference drawn by the jury. Further, in stating that only two had fallen, the State Court is overlooking the evidence of one who fell and testified that he had seen *several* others fall (S.F. 146). Petitioner fails to see wherein those involved different factual situations.

3. *The State Court by its decision and judgment in this cause denied Petitioner a right specially set up and claimed by him under the Federal Employers' Liability Act: the right to have his case tried to a jury.* (R. 12).

The State Court usurped the function of the Jury.

It was the function of the jury to determine whether or not the Respondent failed in his duty to provide Petitioner with a reasonably safe place in which to work. It was the province of the jury to weigh the hazards and to appraise the kind of footing provided. The jury was free to discard or disbelieve whatever facts were inconsistent with its conclusion, and it is immaterial that the State Court might draw a contrary inference or feel that another conclusion is more reasonable. The right to a jury determination of a case brought under F.E.L.A. is jealously guarded by this Honorable Court.

The State Court by weighing the evidence and searching the record for conflicting circumstantial evidence has violated the clear mandate of this Court and deprived Petitioner of his right of trial by jury.

Conclusion

It is respectfully submitted that the opinion of the Supreme Court of Texas in this case is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act; that a Writ of Certiorari should be granted in order that this Court might review the record and the opinion of the Supreme Court of Texas, and finally reverse that judgment and render judgment in favor of Petitioner in accordance with the verdict of the jury, and Petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

DOERNER, RINEHART & STUART
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Certificate of Service

I certify that a copy of the foregoing petition for writ of certiorari has been mailed, on the 24 day of May, 1957, to the respondent's attorneys, as follows: to Messrs. Hutcheson, Taliaferro & Hutcheson, Attorneys at Law, Esperson Building, Houston, Texas, and to Messrs. Woodul, Arterbury & Wren, Attorneys at Law, Chronicle Building, Houston, Texas.

Fred Parks
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APPENDIX A

Reported 290 S.W. 2d 305

No. 15,711

IN THE

Court of Civil Appeals

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Appellant*

v.

JAY LEE GIBSON, *Appellee*

From the District Court of Harris County

OPINION

This is a suit brought by Jay Lee Gibson against New Orleans, Texas & Mexico Railway Company, and others, for damages on account of personal injuries under the Federal Employers' Liability Act, 45 U.S.C., sec. 51 et seq., as amended in 1939. Gibson, an engineer for the defendant Railroad and its Trustee, was injured as the result of a fall in the Settegast Railroad Yards in Harris County, Texas. Trial to a jury resulted in a judgment in favor of the plaintiff and against the defendant, from which the defendant appealed.

Judgment affirmed.

The parties will be designated as in the trial court.

Defendant has brought forward eight points on appeal, the first six of which are disposed of adversely to defendant's contention in view of our conclusion that there was sufficient evidence of probative force and effect to support all but one of the negligence and proximate cause special issue findings made against the defendant. The judgment entered was based thereon, and the finding which was not supported was not fatal to those which were.

The date of plaintiff's injuries was December 5, 1950. On said date the Settegast Yards had been open approximately six months. The tracks within said yards run generally from north to south. The "sets" of tracks, used in the "making up" of trains, were known as "A", "B" and "C" yards. The roundhouse was located at the west side of all three yards. "C" yard was the most easterly yard. The distance between the roundhouse and "C" yard was approximately 900 feet. In walking from the roundhouse to "C" yard an individual must cross all the trackage of "A" yard and "B" yard. There had been no provision made for any walkway in traversing these yards, and, indeed, even had there been one it would be inconceivable for a person going from the roundhouse to an engine "spotted" in "C" yard to have used it, in view of the boxcars and engines on the tracks intervening and in view of the activity on such tracks where trains were being made up or where switching activity was in progress. The evidence showed that such a person, on such a trip, would walk from the roundhouse more or less directly toward the point where the engine (which was his destination) was "spotted" on a track in "C" yard, detouring as necessary on account of activity or idle equipment upon the intervening tracks of yards "A" and "B".

And this was what plaintiff did on the night in question. He had been assigned for several years to the pool freight service running between DeQuincy, Louisiana, and Houston, Texas. The freight trains on this run had been operating in and out of Settegast Yards since they were opened. Plaintiff had been called to take a freight train out of Houston to DeQuincy. He checked in at the defendant's yard office, obtained a ride to the roundhouse, and undertook to walk therefrom to the engine of his train which was "spotted" on a track in "C" yard.

In the newly opened premises the gravel was loose and unpacked. It was about a foot deep in most places, though deeper than that in some others. In the area alongside the tracks where the brakemen were required to work, the loose character of the gravel had been corrected through the use of cement and sand, but between the ties and rails there had been no corrective action. The same thing was true for a foot or two and more to either side of the tracks. This gravel would shift and a person walking thereon would tend to slip and slide as it shifted. It made walking difficult and tiring. Additionally, there was evidence that in the gravel there were stones from "boulder-size" down. Some of these tended to roll as the gravel shifted when a person walked thereon.

As plaintiff, a man weighing 254 pounds, walked across one of the tracks en route to his engine, his foot came down on the graveled surface which included a stone that shifted and rolled. When this occurred, the toe of his shoe was moved in under the web of the rail. Being off-balance the trust of his other foot resulted in the shifting of the gravel, etc., as he tried to keep himself from falling, as the result of all of which he did fall, "twisting" upon one knee, down to at least a semiprone position.

The defendant has interesting and persuasive argument premised upon a distinguishment of the particular object which rolled under plaintiff's foot, carrying it under the rail web. The plaintiff described it from the feel and movement thereof under his foot as a "rock". He testified on cross-examination that he did not see it after he fell, nor did he see it before his foot slipped. He clarified the situation somewhat, to our manner of thinking, when he said, "I couldn't see the rock. There was billions of rocks out there." At least, in our opinion, from this and all the rest of his testimony, and the testimony of other witnesses in the case, the jury was warranted in drawing the inference that he was talking about the larger-sized stones which were a part of the whole mass making up the gravel and one of which rolled within the body of gravel located immediately under his foot. This was within the jury's province and was an inference it was entitled to draw.

In Texas the term "rock" means to most natives what is generally considered as a "stone" by people in certain other parts of the United States, and also to the authors of most dictionaries. Webster uses the word "stones" in his definition of gravel, but we believe that many Texans would more readily understand what he meant had he substituted the word "rocks". He defines gravel as "small more or less rounded stones and pebbles, often intermixed with sand." See also 38 C. J. S., p. 1074, "Gravel".

We believe that in accord with our duty in a case posing the questions here dealt with we are obligated to indulge every reasonable inference in favor of the successful party and disregard all adverse evidence. Furthermore, this being a suit under the Federal Employers' Liability Act, we must remember that the character and amount of evidence

requisite to establish negligence on the part of the defendant is not to be tested by Texas rules of law thereupon but instead by those to be applied to such cases as presenting a Federal question. Texas & P. Ry. Co. v. Younger, 1953 (Tex. Civ. App., Fort Worth), 262 S.W. 2d 557, writ refused, n.r.e., and cases cited. The decisions of the Federal Courts in these cases establish that the jury has the right to make "all reasonably possible inferences" from such of the facts in the evidence as it chooses to accept. Louisville & N. R. Co. v. Botts, 1949 (8th Cir.), 173 Fed. 2d 164, and cases therein summarizing the principal Supreme Court decisions under the Act upon the matter of tests to be applied in sufficiency of evidence questions.

The jury found that the defendant was negligent in failing to use gravel of uniform size and in failing to pack the gravel which was used about and between the railroad tracks, in requiring plaintiff to walk from the roundhouse across the yard to his engine under the circumstances existing, and in failing to provide a smooth walkway or path from the roundhouse across the yards to where the engine was "spotted". Each negligence finding was also found to constitute a proximate cause of the injuries the plaintiff sustained.

In view of the fact that the conditions in the Sertegast Yards were shown to have persisted for approximately six months, there is no doubt but that the defendant must be considered to have had knowledge thereof. Surely, also, defendant had knowledge that it was necessary for plaintiff and other employees to walk across the premises as plaintiff did on the occasion in question. In view thereof, and in view of the testimony about the way and manner in which the gravel used about and between the tracks would

shift and slide as a person walked thereon, about the large sizes of some of the stones in the gravel, coupled with the showing that such condition was not such as existed generally in railroad yards, the jury was warranted in finding that the defendant was negligent in failing to pack the gravel used and that such negligence was a proximate cause of plaintiff's injuries. Chicago Great Western Railway Company v. Smith, 1955 (8th Cir.), 228 Fed. 2d 180; Kansas City Southern Ry. Co. v. Chandler, 1945 (Tex. Civ. App., Beaumont), 192 S.W. 2d 304, writ refused, n.r.e.; Fleming v. Hustad, 1947 (8th Cir.), 164 Fed. 2d 65; Fleming v. Kellett, 1948 (10th Cir.), 167 Fed. 2d 265; Lavender v. Kurn, 1946, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916.

We do not believe the jury's finding of negligence in connection with defendant's failure to use gravel of uniform size about and between the tracks was supported by the evidence. There is no evidence that the gravel which was used by the defendant was not of a size suitable for the purpose. Of course, gravel of uniform sized stones or pebbles would be better, but a master is not by reason thereof obliged to use it. It was not located where members of the general public, unfamiliar with usages in railroad yards, would come in contact with it. For the purposes of railroad engineers, who must walk across tracks as the plaintiff was required to do, something less fine than gravel of uniform size should certainly be reasonable. There is no evidence in the record to the contrary. Indeed, the record does not demonstrate any duty on the part of the defendant to use any gravel at all in the railroad yards. Fort Worth & Denver City Ry. Co. v. Burton, 1942 (Tex. Civ. App., Amarillo), 158 S.W. 2d 601, writ dismissed; Louisville & N. R. Co. v. Davis, 1935 (6th Cir.), 75 Fed.

2d 849; Norfolk & W. Ry. Co. v. Hall, 1931 (4th Cir.), 49 Fed. 2d 692.

The conditions created by the character of the gravel in question in the Settegast Yards were continuous rather than an unusual circumstance existing at the time plaintiff's duty required him to walk across the premises. We are of the opinion that it was for the jury to determine whether defendant's failure to provide him with a reasonably safe facility whereby the distance from the roundhouse to the engine might be traversed, or to make reasonably safe the premises necessary to be traversed in reaching the engine, was negligence and a proximate cause of his injuries, particularly in view of the fact that assumption of risk is not a defense to suits for damages in this kind of case. Texas & P. Ry. Co. v. Presley, 1941 (Tex. Com. App.), 137 Tex. 232, 152 S.W. 2d 1105; Chicago Great Western Railway Company v. Smith, supra; Kansas City Southern Ry. Co. v. Chandler, supra; Fleming v. Husted, supra; Fleming v. Kellett, supra; Lavender v. Kurn, supra; Missouri-Kansas-Texas R. Co. v. Evans, 1952, 151 Tex. 340, 250 S.W. 2d 385.

In view of the matters hereinbefore related, plaintiff's judgment is supported by evidence of sufficient probative force and value, despite our holding that one of the negligence issues does not contribute to such support.

By a seventh point the defendant contends that the trial court erred in refusing to set aside a jury finding that the plaintiff's negligence in failing to use a flashlight as he walked upon the occasion in question was not a proximate cause of his injuries. The jury affirmatively found such negligence. It is to be noted that in answer to a special issue, the burden of which was cast upon the plaintiff, the jury

found that the defendant did not fail to properly illuminate the portion of the yard plaintiff was required to use in carrying out his duties. Under the circumstances of this case, we are of the opinion that the question was for the jury and the answer within their power of ultimate determination. The point of error is overruled.

Defendant preserved an additional exception to the submission of the special issue which inquired whether defendant was negligent in failing to use gravel of uniform size about and between the tracks where the plaintiff was required to walk. Defendant contended that the issue assumed that gravel of a uniform size was not used and therefore the manner in which it was framed constituted a comment upon the evidence. The evidence was undisputed that the gravel used was not made up of stones or pebbles of uniform size. Defendant's testimony was to the effect that any sized "rock" which would go through a two-inch screen was included. The point of error would be overruled for this reason. It is noted, however, that we have already held that the issue was not raised by the evidence and should not have been submitted. Further noted was our conclusion that plaintiff's judgment would nevertheless find support in the answers returned to other issues. The same thing would be true were we to sustain defendant's point of error because the issue amounted to a comment upon the evidence. It would not be such error as would inhibit the judgment, as it would be confined to the issue, one unnecessary to the judgment, and therefore harmless. T.R.C.P. 434.

Judgment is affirmed.

April 20, 1956

FRANK A. MASSEY
Chief Justice

APPENDIX B

Reported 298 S.W. 2d 97

No. A-5912

IN THE

Supreme Court of Texas

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Appellant*

v.

JAY LEE GIBSON, *Appellee*

From Harris County Second District

JUSTICE SMITH: This is a negligence case in which respondent, a locomotive engineer, brought suit under the Federal Employers' Liability Act against the petitioner, and two other railroad companies, seeking damages for injuries suffered as a result of failure to provide respondent with a safe place to work. It was alleged that the respondent was injured on December 5, 1950, and that at that time he was an employee of one or more of the defendant railroad companies, and that Guy A. Thompson was the Trustee for each of said companies. The cause was tried before a jury which returned a verdict in favor of the respondent. Based on the verdict, the court entered judgment in favor of the

respondent and against the petitioner. The court rendered judgment that respondent take nothing as against the other railroad defendants. This action is not involved. Petitioner perfected an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas. This court, under the rule authorizing equalization of the dockets of the several Courts of Civil Appeals of Texas, transferred this cause to the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas. That court has affirmed the judgment of the trial court. 290 S.W. 2d 305.

Respondent in his petition alleged in general terms that while discharging his duties as a railroad engineer for petitioner and at about the hour of 1:40 a.m., December 5, 1950, he was "walking from the roundhouse at Settegast Railroad Yards to his engine which had been 'spotted' at a point some distance from the roundhouse, when because of the unsafe conditions of the railroad yard, it having been covered with a large amount of loose gravel made up of large and small stones, the plaintiff was caused to slip and fall," resulting in serious and permanent injuries. These general allegations were followed by allegations of specific acts of negligence on the part of the petitioner charging that respondent's fall and resulting injuries were caused by nine specific acts of negligence and that each and all of said acts of negligence, separately and concurrently, were a proximate cause of the respondent's fall and of the injuries suffered and sustained by him.

The nine acts of negligence were alleged as follows:

"1. In spotting the engine which the Plaintiff was to operate in an unsafe place under the circumstances and conditions then existing.

"2. In requiring the Plaintiff to walk from the roundhouse across the yard to his engine under the circumstances and conditions then existing.

"3. In covering the railroad yard about and between the tracks where Plaintiff was required to walk with large and small pieces of stone.

"4. In failing to use gravel of uniform size about and between tracks where Plaintiff was required to walk.

"5. In failing to firmly pack the gravel about and between the tracks at the place in question.

"6. In failing to properly illuminate that portion of the yard which Plaintiff was required to use in carrying out his duties.

"7. In failing to properly illuminate that portion of the yard where Plaintiff slipped and fell.

"8. In failing to provide a smooth walkway or path across the yards to the place where the engine was spotted.

"9. In failing to furnish the Plaintiff with a safe place to work."

The jury found that the petitioner was negligent: (1) in requiring the respondent to walk from the roundhouse across the yard to his engine under the circumstances and conditions existing on the night in question; (2) in failing to use gravel of uniform size about and between the tracks where the respondent was required to walk; (3) in failing to firmly pack the gravel about and between the tracks at the place in question; and (4) in failing to provide a smooth walkway or path from the roundhouse across the yards to the place where the engine was "spotted."

Since this is a "no evidence" case and is an action under the Federal Employers' Liability Act, we deem it not only

necessary to discuss the evidence or lack of evidence and its effect but to lay down the rules governing our decision.

The safe place to work, which the petitioner was under a duty to furnish respondent, involved in this case is Settegast Yards. The evidence relative to the manner of construction of the yards is substantially without dispute. The Yards were comparatively new and the evidence shows that these Yards were constructed by the use of the latest techniques and methods and the plans and specifications followed were approved by the American Railway Engineers' Association; that the Association referred to is a national organization. C. R. Dubose, a witness called by the petitioner, testified:

"My name is C. R. Dubose; I am employed by the New Orleans, Texas & Mexico Railway Company and have been since 1924 as a civil engineer. My work primarily involves track construction, industrial track yard design and terminal design, freight and passenger terminals. In 1948, '49 and '50 I was resident engineer on the construction of Settegast yards, here in Houston."

"Please tell the jury something about the planning and construction of that yard.

"A. Well, it was designed as a freight terminal under the A.R.E.A. specification and practice.

"Q. What is the A.R.E.A.?

"A. That is the American Railway Engineering Association, of which I am a member. It is primarily a freight yard and laid out on that construction.

"Q. Were those plans and specifications that you followed, were those approved by the American Railway Engineers' Association?

"A. Yes, that was the standard practice and specification that we followed in the design and construction of that yard.

"Q. Is that Association, the A.R.E.A., is that local?

"A. No, sir, it is national.

"Q. Of what is it composed?

"A. It is composed of railroad engineers over the United States, mostly in a supervisory capacity. To be a member of the A.R.E.A. you must meet certain qualifications by having so many years experience in this certain field, not followed by other engineers.

"Q. These specifications used in the construction of that yard, was that the best thinking of engineers developed in the construction of railroad facilities?

"A. That is true. The specifications and general plan are an accumulation of committee reports. We have committee reports on various phases of railroad construction, and they are compiled in the committee reports that are available to all members."

"The Ballast used in the yards was pit run gravel. The specifications were that it must pass a 2 inch screen. It would eliminate rocks that would not pass a 2 inch screen. The first six inches of gravel was spread by draglines, and bull dozers over the entire area. . . . The tracks were built on this six inches of gravel. Additional gravel was then unloaded from hopper bottom cars, making 12 inches of gravel, then it was levelled off between the rails to the top of the ties. . . . The gravel was tamped immediately in the tracks. There was no tamping between the tracks. The only tamping along the track was by a machine. . . . At that time that was the best known specifications and plans that we had to follow and we followed them. The gravel as it was put in was levelled off even with the ties. As the gravel picks up soil and dirt it becomes more solid. It is

rather loose when it is put in but it acquires soil and dirt."

"Q. You have walked in the yard at night when the lights were on?

"A. Yes, I have walked it many times. Being resident engineer I have been there many times.

"Q. Tell us about the gravel after it was first installed.

"A. It was pit run gravel and it was hard walking, but I wouldn't say that it was dangerous. It was just like gravel in the fill of any road, and I have walked back and forth quite a number of times through there.

"Q. The lights, then, the lighting of the yard and the gravel type of construction of the yard, the method that the gravel was placed in the yard, did all of those things meet all of the specifications that you engineers had access to at the time?

"A. To the best of our ability and knowledge at that time."

"In the period from June to December, the gravel would tend to sink and become more solid because as you use it and walk over it, the vibrations of the train would tend to set the gravel up more than when it was put in. We use gravel out of the same pit that this came from in other yards on the line to Brownsville."

On cross-examination the witness testified as follows:

"There was 12 inches of pit run gravel spread over the yard and levelled off between the rails to the top of the ties. It was standard gravel."

"Q. You are not testifying there were not some rocks out there as big as my fist?

"A. In all of our specifications we do not have anything that would not pass a two inch screen, and we tested samples to see if it met specifications.

"Q. There could be rocks as big as my fist?

"A. I don't see how there could be, because you can't tamp them. You have shovels and machines that push the gravel under the tie and if you put those big rocks in there they would not hold because of the vibrations. They would stick down and would not hold."

The yards had been in use about six months at the time of this accident. Respondent had, for several years, been assigned to the freight service running between DeQuincy, Louisiana, and Houston, Texas, and he had been operating into and out of Settegast Yards since the Yard had been open on an average of three times a week. Settegast is a large freight yard divided into three sections—"A", "B", and "C". There are numerous tracks in the yard and these tracks run in approximately a north and south direction. The usual location for spotting trains going to DeQuincy was in "C" yard, about 900 feet west of the roundhouse. It was this distance from the roundhouse on the east to the locomotive spotted in yard "C" on the west side of the yards which respondent was required to walk. On the night in question, respondent had been to his locomotive having walked the distance of 900 feet from the roundhouse through yards "A", "B", and "C" to the point on the west side of "C" yard without mishap. Respondent returned to the roundhouse to answer a telephone call and it was on the return trip to the locomotive while passing through Yard "B" that the fall and resulting injuries occurred. In regard to the fall and the physical condition of the yards, the respondent testified as follows:

"As I was going back to the engine I was walking and zigzagging through the yard where the cars were standing walking around where they were switching cars back and forth, kicking them down the *the* lead, to avoid those cars,

and as I went back I was getting pretty close to the engine and I fell by stepping on a round rock that slipped my foot under the web or base of the rail and it caught me because I was off balance, and I tried to pull against it, and that foot was in there tight, and this foot was in the center of the track to keep from falling, and the round gravel slid out from under me, causing me to twist as I fell. I had my gloves on and this hand went right down between the rails, with my head between the ties, and it flopped my head back to the center of my back, . . . it just popped, and as this knee went down I got a big gash on my knee. It was all bruised up and a gash cut in it."

On cross examination Respondent testified with respect to his falling as follows:

"Now, in walking back across there you had walked quite some distance before, as you explained it, you slipped on a rock?

"A. Yes.

"Q. Did there seem to be any difference in the feel of this rock you slipped on and any of the other rocks you had been walking over?

"A. Well, yes—the only way I can explain it, Mr. Hoover, in terms of my language.

"Q. Well, that is the way I want it.

"A. Well, I couldn't explain it in a lawyer's language.

"Q. I don't want you to.

"A. All I can do is give you approximately in all of the railroad slang I know. When I slipped on that rock I shot my foot sort of quick; that was the difference in time, it was quicker, and I lost my balance by my foot going under the web of the rail, and I fought against it and I just went over.

"Q. Which foot stepped on that particular rock?

"A. The right foot.

"Q. Had they held you pretty well in walking across the ground, had you slipped out there before?

"A. The gravel did work under you, yes.

"Q. It worked under your feet because it was loose?

"A. Yes, sir.

"Q. The difficulty, however, was when you stepped on this particular rock you slipped?

"A. Well, it just shot me, just like a man would be if a calf was throwed.

"Q. Did your right foot catch under the rail?

"A. It went under the web of the rail. It caught my toe under the web, and it was caught by the gravel, and I couldn't get it out.

"Q. Then your left foot came around?

"A. Yes, I was in motion and it went in between the rails and hit, I imagine, on the tie with that little round gravel, and when it did that, that little round gravel let it go plumb out because this foot was hung and it had a pressure trying to get this one loose. It was sort of like roping a calf.

"Q. You had one foot hung under the rail, and this foot went across and hit in between the rail?

"A. Yes, sir.

"Q. Then you fell forward?

"A. Yes, sir.

"Q. Could you tell from the feel whether the rock you stepped on was on the tie or in between the tie?

"A. No, it was not on the tie, I don't think so.

"Q. Then it must have been in between the ties, at the end of the rail.

"A. It could have been. This gravel had clear places in it. The gravel would be over the tie, and in other places

you couldn't see the tie. *It was characteristic of a railroad yard.* I am sure you understand, I don't know about the jury.

"Q. Could you see the particular area you were stepping on?

"A. It looked solid enough for me, but just like I say, this particular rock I stepped on rolled across my foot to slide in under this web of the rail and it hung.

"Q. Was there anything about this particular rock, was there any oil or grease on it to make it slicker than normal?

"A. There could have been grease on it. I didn't stop to inspect it.

"Q. I believe you said you never saw the particular rock there before or after?

"A. No.

"Q. And the only way you can describe it is how it felt on the sole of your foot and the way it reacted when it scooted out from under you?

"A. That is all I know."

It will be noted from the foregoing excerpt that there is no contention made by Respondent that there was any depression or unevenness in the yard. The only cause of the fall was the rolling of rock upon which he stepped.

"The yard was covered with gravel a foot thick at most places. It was laid on prairie land and was scattered on there heavy for the weather and stuff to pack down. It consisted of wash gravel from boulder size down to small gravel; what I would call wash gravel with clay in it, it was heavy throughout the entire yard. Awfully hard and heavy to walk in.

"The heavy gravel was awfully hard to walk on. Your feet would sink in it, it was rolling and hard to walk in.

Any gravel is hard to walk in, whether there or in any place. When you are coming into the yards (off of a run) you can walk down the leads, which is easier than walking across the tracks. It is rougher walking across the tracks than down the tracks. Since this was a new yard and the gravel was loose. I walked on it and all the other men walked on it.

"Q. Have you seen any of the other boys fall?

"A. I wasn't looking for anybody to fall on it."

"The condition in Settegast yards was different from other freight yards in that they did not have *that much* loose gravel in other yards."

Pat D. O'Connell, a witness called by the respondent, testified in regard to the condition of the yard as follows:

"I am a locomotive engineer for the New Orleans, Texas and Mexico Railway Company and have been since 1941. My run is between DeQuincy and Houston and on that run we enter and leave out of Settegast yards here in Houston.

"I am familiar with the condition of Settegast yards as it existed December 5, 1950 between the area of the roundhouse and where the engines are spotted in 'C' yard. I walk over that area every trip. It was a brand new yard and it was covered with pit run gravel. There was no path for us to walk on. Loose gravel is a dangerous proposition whether you are walking or driving a car on it. *You will fall if you are not careful.* I fell one night when I stepped on a rail and had on hard sole shoes."

He further testified that it was loose gravel, not packed down; that in his forty-five years of railroading he had

been in and out of about one hundred railroad yards and this condition did not exist in the other yards.

"This condition was not common to all the other railroad yards that I have seen. All the others have been *older yards and they were gravel but the gravel had packed more or less.*" (Emphasis added);

that everybody knew the condition of the yard well enough that they dreaded walking across there.

Troy G. Walker, another witness called by respondent testified:

"Q. Will you describe to me generally the condition of Settegast Yards in the area between the roundhouse and 'C' yard on December 5, 1950?

"A. Well, on the 'C' yard it is loose gravel, very loose and pretty good-sized rocks. The 'B' yard is not as bad as 'C' yard, and from 'B' yard over to the roundhouse it is good walking.

"Q. Was that gravel spread on heavy or thin?

"A. In my opinion it was heavy."

John E. Hill, a former employee of the I. & G. N. Railroad, and who had worked at Settegast Yards as a car inspector from the time it opened until sometime in 1951, was familiar with the area from the roundhouse to "C" yard. He testified that the yard was covered with big gravel and that, as you walk through it, you would take a step and slip.

Respondent argues that a peculiar situation exists in Settegast Yards, in that the usual situation in such yards is for the engineer to move the engine out of the roundhouse, but by contract agreement between Settegast Yards and the hostlers, the locomotive engineers who were to

take the trains out of Settegast Yards were not permitted to move the trains from the roundhouse to the place where the freight train was made up. This was done by the hostlers, hence the petitioner was guilty of negligence in requiring the respondent to walk from the roundhouse across the yard to his engine where it had been spotted by the hostlers. In this connection, we point out that although respondent charged the petitioner with negligence in spotting the engine which he was to operate in an unsafe place, no issue was submitted or requested to be submitted thereon. Respondent further contends that in addition to the so-called peculiar situation or arrangement mentioned above, certain other facts render it impossible for this Court to say, as a matter of law, that petitioner provided a reasonably safe place to work. A summation of such contention is found in his answer to the application for writ of error and reads:

"* * * Add to this the fact that this situation was not made known to the construction engineers at the time they were drawing the plans and specifications for Settegast Yards. And, further, consider that though the resident civil engineer thought there would be provision made for the engineers to walk from the roundhouse to their engines, the railroad for a period of six months, continually required their employees to walk this distance without making any provision for their safety. One employee described the condition at Settegast Yards as the worst he had ever seen, and another stated that everybody that customarily walked in the yard knew the condition of the yard well enough that they dreaded walking across there. In the light of such testimony, the jury, the trial judge and the Court of Civil Appeals, found that the Petitioner had not complied with its duty to furnish

the Respondent with a reasonably safe place to work. And, of course, the very thing that should have been anticipated, that is, that in slipping and sliding in the loose gravel, someone would fall and be injured, did finally on December 5, 1950, occur.

"To say as a matter of law, that Petitioner provided a reasonably safe place to work is to say that there was no evidence to show that a man's feet would slip and slide and the gravel would roll under his feet as he walked. And, further, to say that Petitioner acted as a reasonably prudent employer, even though it made no provision for its employees to walk this distance, is to completely reject the reasonable inference to be drawn from Mr. Dubose's testimony that he thought some provision would be made for them.

"Petitioner strongly relies on the fact that the railroad yard was constructed according to specifications laid down by the American Railroad Engineers Association. But, the record affirmatively shows that this association in setting out these specifications was not advised that men would be required to walk from the roundhouse to 'C' Yard. Therefore, the fallacy in Petitioner's argument, is that although the yard was undoubtedly a safe yard for trains, this does not make it suitable for the purpose for which it was necessarily employed by the Respondent and other engineers, namely, as a walk-way.

"As the court in Fleming v. Husted, 164 F. 2d 65 (8th Cir. 1947), page 66, stated: 'and the trustee's duty under the Federal Employers Liability Act was to exercise reasonable care to try to make the platform generally safe for all the uses for which it was intended or permitted to be a facility in the course and scope of its employee's duties' "

The petitioner's points one and two challenging the judgments of the trial court and the Court of Civil Appeals on the ground: (1) that as a matter of law there was no evidence which would permit, or support, a finding of negligence against petitioner, and (2) that as a matter of law there was no evidence which would permit, or support, a finding that any alleged negligent act or omission on the part of petitioner was a proximate cause of respondent's injuries, must be sustained. Under the Federal Employers' Liability Act, petitioner has the duty to use reasonable care to provide respondent with a reasonably safe place to work. In the recent case of Port Terminal Railroad Association v. Ross, — Tex. —, 289 S.W. 2d 220, this Court announced that "Until required to do so by a clear and positive declaration of the highest federal tribunal, our trial and appellate courts cannot and should not give effect to a jury finding of negligence when in its opinion the record is completely devoid of evidence in support of same." The Act requires a finding of negligence, which is supported by the evidence.

While we recognize that the question of what constitutes negligence, and the sufficiency of the evidence to raise that question for the jury is to be determined by the applicable federal decisions, we adhere to the rule that this Court in determining the question of no evidence reserves the right to appraise the evidence in accordance with the concept of negligence as announced by this Court in prior cases. The trial court in its charge defined negligence and proximate cause and the definitions given were the same as have been given in this jurisdiction and approved in common law tort actions. In the case of Great Atlantic & Pacific Tea Company v. Evans, 142 Tex. 1, 175 S.W. 2d 249, this Court held that negligence

rests primarily upon two elements: (a) reason to anticipate injury, and (b) failure to perform the duty arising on account of that anticipation. The term "negligence" means the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances. The question of no evidence of negligence is one of law to be determined by this Court. It is well settled that even though injury may result from a person's act or omission, the actor is not to be held responsible if he could not have reasonably foreseen the resultant injury, or injuries, similar in character, it is unrealistic to say that the liberality of the federal decisions on questions involving the great weight and preponderance of the evidence shall govern this Court in determining a question of "no evidence." The principal question for us to determine is: What constitutes a reasonably safe place to work and was the petitioner negligent in failing to furnish the respondent a safe place to work. We disagree with respondent's contention that this question is to be determined by federal decisions alone. The question is to be determined by the evidence in the light of the trial court's charge and the decisions pertinent to the particular question involved. The proper test to be applied is the one stated by the trial court, which was in effect, that in determining liability were the facilities provided or was the place to work such as a person of ordinary prudence would have provided under the same or similar circumstances, having in mind the employer's duty to furnish a safe place to work. See Chicago Great Western Railway Company v. Smith, 8th Cir., 228 F. 2d 180. If the employer knows, or in the exercise of ordinary care should know that prevalent con-

ditions are inadequate to protect his employees from injury, then negligence, within the meaning of the Federal Employers' Liability Act, attaches. See Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. These same rules of law were followed by this Court in determining the "no evidence" question involved in the case of Hopson v. Gulf Oil Corporation, 150 Tex. 1, 237 S.W. 2d 352.

Thus, we have federal decisions and state decisions determining "no-evidence" questions by using the same settled rules of law. We also recognize the rule that a court in a Federal Employers' Liability case is required to take a liberal view of the scope of permissible inferences open to the jury. However, we draw the line if such rule means that the jury is to be permitted to draw inferences not based on fact. In holding that the record is devoid of evidence showing negligence on the part of petitioner in furnishing respondent a safe place to work, we are not unmindful of the rule that the petitioner must show that reasonable-minded men could not draw different inferences from the evidence. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

We hold there is no evidence to warrant a finding that petitioner was guilty of any breach of duty owed to respondent with respect to the method and manner and material used in the construction of Settegast Yards. Petitioner in building the yards in question was using plans and specifications advanced and approved by the best qualified construction engineers in America. The very basis of respondent's cause of action is the charge that his injuries and damages were sustained because of the unsafe condition of the railroad yards due to the use of loose gravel or stones in the construction of the yards, and

the jury findings of negligence all pertain to the loose gravel. There is no evidence that anyone had ever made any complaint to petitioner regarding the condition of the yard and there is no evidence that petitioner had knowledge that anyone had ever fallen while working in the yard. It is true that the record shows that one witness testified that he fell while stepping on a rail, and another testified as to stumbling and falling, but we regard such evidence as not controlling since they involve different factual situations. The standard to test the question of negligence vel non is the common experience of mankind, and implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case. Great Atlantic & Pacific Tea Company v. Evans, supra. The question of the existence of negligence and its degree depend upon the facts and circumstances of each case, and the inferences to be drawn by the trier of the facts therefrom. We hold that the evidence wholly fails to produce any reason for petitioner to anticipate injury to an employee who could as the respondent give his undivided attention to walking. The fact that the gravel was about 12 inches deep and loose and thereby rendered it inconvenient and more tiresome for the respondent to negotiate the distance from the roundhouse to the engine, does not give rise to an anticipation of injury. The duty resting upon the employer, the petitioner in this instance, was to furnish a safe place for the employee, respondent, to work, not to furnish an easy and convenient place. While the facts are not exactly similar, we think the rule announced in the recent case of Rogers v. Thompson, Trustee, Missouri Pacific Railroad Company (Sup. Ct. Mo. 1955), 284 S.W. 2d 467, has some application here. The negligence alleged against the de-

fendant in that case was permitting loose gravel to remain on a culvert over which plaintiff was forced to work. In holding against the contention of plaintiff, the Court said in part:

"In our case, plaintiff's testimony leaves much unsaid as to the actual condition at the west end of defendant's drainage culvert, and as to the place where defendant was stopping when he fell. Plaintiff's testimony at best tends to show the fact that generally there was a level shoulder between the edge of the ballast and the crest of the dump supporting defendant's tracks. This level shoulder was supposed to be kept there so that section men might have a safe place to walk when working. There were flat surfaces across the ends of culverts, but not 'like' the shoulders were. Considered from a standpoint most favorable to plaintiff, it reasonably could be said the flat surface across the west end of the culvert in question was narrower than elsewhere along the shoulder, and the vibration of trains had loosened and shaken down some gravel or crushed rock so as to make an inclined surface down to or near the end of the culvert. Plaintiff's testimony, which we have quoted in question and answer form, supra, was support for a conclusion that plaintiff slipped on gravel 'right up next to the ties'; however, at another time while testifying, plaintiff said 'I didn't back up east, next to the rails.' Even so, the condition of the culvert was not shown to have been unsafe for workmen in the ordinary use of the area in maintaining the tracks, including the firing and attending the firing of 'spots' of weeds along the shoulder and incline of the dump. Can it be correctly said that a reasonably careful and prudent person would assume that loose gravel or crushed rock, shifted down on the shoulder at the culvert by the vibration of trains, would subject

section men to an unreasonable hazard, accustomed as section men are to moving over tracks, ties and ballast in their multiple duties in the maintenance of the line? It is established that the standard of care must be commensurate to the dangers of the business. Less diligence is required where the danger is slight than where great. Frizzell v. Wabash R. Co., 8 Cir., 199 F. 2d 153."

There is no evidence in the present case that the method of construction used in constructing the Settegast Yards was not suitable or that there was in use by respondent or any other railroad company any different method of construction of freight yards which involved less danger of injury to their employees than the methods used in the instant case. There is no evidence that any railroad company undertook to pack the gravel at the time of construction of the yard. We think from the evidence it is a fair deduction to say that all railroad yards were originally constructed by the use of loose gravel, and that the element of time was responsible for the fact that a portion of the gravel became packed. The respondent does not suggest in his pleadings that some material other than gravel should have been used.

Since we have held that the record is devoid of evidence supporting the jury findings of negligence on the part of petitioner, it necessarily follows that the judgments of the trial court and the Court of Civil Appeals must be reversed and judgment entered that respondent take nothing. It is so ordered.

CLYDE A. SMITH
Associate Justice

Opinion delivered:
January 23rd, 1957

APPENDIX C

IN THE SUPREME COURT OF TEXAS

January 23, 1957

No. A-5912

Guy A. Thompson, Trustee, N. O. T. & M. Ry. Co.

vs.

Jay Lee Gibson

From Harris County, 2nd District.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Second Supreme Judicial District, and the original transcript as well as the transcript showing the proceedings had in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgments of the Courts below, it is therefore *Ordered* that said judgments be, and hereby are, reversed and set aside; and this Court proceeding to render such judgment as should have been entered below, it is *considered, adjudged, ordered and decreed* that respondent (plaintiff), Jay Lee Gibson, have and recover nothing from petitioner (defendant), Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, but that the said petitioner, Guy A. Thompson, Trustee etc., go hence without day and do have and recover of and from the said respondent, Jay Lee Gibson, all costs in this behalf expended and incurred in this Court, the Court of Civil Appeals and District Court, and that this decision be certified to the District Court of Harris County, Texas, for observance.

APPENDIX D

February 27, 1957

No. A-5912

Guy A. Thompson, Trustee, N. O. T. & M. Ry. Co.
vs.
Jay Lee Gibson

From Harris County, 2nd District

This day came on to be heard respondent's motion for rehearing and respondent's motion to postpone consideration of motion for rehearing in the above numbered and styled cause, and, after due consideration, it is ordered that said motions be, and are hereby, overruled.

APPENDIX E

STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority, exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929; 28 U. S. Code, Sec. 1257.

APPENDIX F

FEDERAL EMPLOYERS' LIABILITY ACT

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

APPENDIX G

CONTRIBUTORY NEGLIGENCE

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U.S. Code, Sec. 53.

APPENDIX H

ASSUMPTION OF RISK OF EMPLOYMENT

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.

APPENDIX I

ACTIONS; LIMITATIONS; CONCURRENT JURISDICTION OF COURTS

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989; 45 U. S. Code, Sec. 56.

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IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted]142

JAY LEE GIBSON, *Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1956

No. 1034

JAY LEE GIBSON, *Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

PETITIONER'S REPLY BRIEF

I.

Respondent's Statement of Facts Does Not Include Those Facts Favorable to Petitioner.

Reason requires the concession that Respondent could have covered its railroad yards with gravel of such a hazardous nature that it would be negligent as a matter of law to require employees to walk on it. For example, gravel as round as marbles spread a couple of inches over a base as firm as concrete would be considered negligent as a matter of law. At the other extreme, Respondent could use gravel that gave such sure footing that, as a

matter of law, it would not be negligent to require employees to walk and work on such gravel. An example of this might be the type of gravel used to surface streets spread to the same depth as when used on streets and tamped or rolled down as are streets. Between these two extremes, there lies the province of the jury.

One of the primary controversies in the present case is and has been whether the gravel actually used by Respondent falls into the classification of a type not negligent as a matter of law, or whether the gravel was of a type and was used in such a manner that the use could not be classified as negligent or not negligent as a matter of law, and thus required jury determination of the question of negligence.

The legal significance of the gravel being the primary inquiry at this point, it becomes important to examine the testimony describing that gravel, keeping in mind the admonition of this Honorable Court in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, that Petitioner, having secured a jury verdict and a trial court judgment, is entitled to have the facts and inferences favorable to him, and those alone, considered.

In quoting and summarizing portions of the evidence in his brief, Respondent has failed to view the evidence most favorable to Petitioner but has quoted much that is unfavorable and contradicted.

Petitioner readily concedes that the testimony quoted by Respondent was adduced on trial, but most of that testimony is not to be considered for purposes of this appellate proceeding. The trial court and the jury heard

the testimony and observed the witnesses. Their verdict and judgment are given strong weight in a F. E. L. A. proceeding on appeal where the reviewing court will look only to the reasonableness of the inferences and conclusions drawn by the jury, ignoring contradictory evidences and inferences.

Factually, Respondent has relied on testimony that:

(1) the gravel was "just regular railroad gravel" (Respondent's Brief, pp. 7, 13);

(2) the railroad yards were built in conformity with A.R.E.A. specifications (Respondent's Brief, pp. 8, 9, 16);

(3) the "looseness" of the gravel was common to all new yards (Respondent's Brief, pp. 6, 7, 9); and,

(4) apparently, contributory negligence; a person could fall "if you are not careful" (Respondent's Brief, p. 6). Petitioner "could give his undivided attention to his walking" (Respondent's Brief, p. 14). As to this, contributory negligence is not a defense in F.E.L.A. cases, 45 U. S. Code, Sec. 53.

There is testimony, favorable to Petitioner, controverting each of these points. There was direct, unequivocal and uncontroverted testimony that A.R.E.A. specifications called for pit-run gravel that would pass through a two-inch screen (S.F. 303). Yet there was a wealth of testimony, which the jury must have believed, that much of the gravel used in Settegast Yards would not pass through a two-inch screen. The gravel was variously described as "big as hen eggs or bigger" (S.F. 96), "as big as a man's fist" (S.F. 145, 157), ranging in size from "pea gravel up to at least 4 or 5 inches in diameter" (S.F. 194).

There was ample contradiction to the testimony of Respondent's resident engineer that gravel in excess of two inches was used. In fact, even the resident engineer did not so testify. His testimony was:

> ". . . we tested samples to see if it met the specifications." (S.F. 309)

Respondent's statement that "there was no intimation of any character that gravel of a different size or character was ever used by any other railroad company in covering its yards" is simply not well taken. Respondent's own testimony was that the A.R.E.A. plans and specifications called for two-inch gravel, but there was a wealth of testimony that gravel larger than that size was used (S.F. 96, 145, 157, 194). There was also a wealth of testimony by witnesses who had experience in many, many railroad yards that this was not the situation ordinarily found. Nor was the testimony that there were a "few" pieces of gravel in a yard larger than two inches in size (S.F. 138, 151). It seems a fair inference that other yards followed A.R.E.A. specifications and used two-inch gravel, but the evidence clearly shows that this was not done in Settegast.

This disposes of the contention that A.R.E.A. specifications for two-inch gravel were followed. And if we believe that A.R.E.A. specifications were generally followed in other railroad yards, as Respondent would have us do, this alone disposes of the contention that the gravel was "just regular railroad gravel". But note also the testimony of Pat O'Connell, who had been "railroading" about forty-five years, who testified:

"Q. Is that the size gravel they use in all of the yards?
A. No, sir. I am not too familiar with all of the southern yards, but wherever you are in a coal-burning district there is gravel put down first on the dirt and it is covered with cinders, or some other material where you can navigate around it. In Settegast Yards they covered the leads with shell where the switchmen can have a place to walk and can walk in safety." (S.F. 139).

Considering Respondent's contentions that the "looseness" of the gravel at Settegast Yards was common to all new railroad yards and that it would settle in time, there was ample contrary evidence that this was not so. On cross-examination a locomotive engineer testified that in the six months since the gravel had been laid, the gravel hadn't packed any, but was about the same (S.F. 144-145). He testified also that he had been in and out of about one hundred railroad yards in his forty-five years of railroading and this condition did not exist in other yards. Settegast Yards was the worse he had ever seen (S.F. 138). If this was the normal situation and if the gravel would become less loose with time, why did Respondent surface about 7,600 feet of leads for the switchmen (S.F. 139)? Contrary to Respondent's contentions, it was possible to tamp down the gravel. Respondent's own resident engineer testified:

"Q. Was there any rolling or tamping?
A. The only tamping is immediately in the tracks. There is no tamping between the tracks. The only tamping along the tracks was by a machine." (S.F. 304)

Spread over the yards to a depth of a foot or more (S.F. 19, 303), the gravel was rolling and hard to walk

in as it would work under the employees' feet causing slipping and sliding. (S.F. 194, 309).

"A. * * * But about that loose gravel, whether you are walking or driving a car in it, *it is a pretty dangerous proposition.*

Q. Why is that?

A. Well, when you step on it gravel goes in all directions, and you fall if you're not careful." (S.F. 136-137).

"Q. Would you say the condition you have described in Settegast Yards was a condition that existed generally over all the yards?

A. No, sir, that condition out there was the worst I ever saw. (S.F. 138). The gravel wasn't even with the ties. There was quite a bit of irregu ity" (S.F. 155).

Petitioner and other employees would avoid the walk across this gravel if possible (S.F. 19-20, 51, 157).

There is some indication that Respondent recognized this dangerous situation.

At least *several* people had lost their footing in the sliding gravel and fallen down (S.F. 137, 146, 201). One who had fallen testified of several incidents (S.F. 137). This hazardous situation was corrected in one portion of the yard where Respondent covered about 7,600 feet of leads with sand so that the switchmen could have a place to walk in safety (S.F. 139). These walkways were provided by spreading cover sand (S.F. 313), which had cement in it and normal moisture would set up a crust about one and one-half inches thick (S.F. 310). But there was no pathway or any other safe means provided for engineers to cross the yard from the roundhouse to yard "C" (S.F. 21, 137), though there was nothing to

prevent Respondent from providing the same, simple, inexpensive pathways for other employees as it had provided for the switchmen by the simple expedient of spreading cover sand to form a pathway wider than the length of a box car. It is apparent that this matter was given some thought as evidenced by the testimony of C. R. Dubose, resident engineer on the construction of Settegast Yards, who, testifying for Respondent, said in reference to the engineers having to walk across this gravel: "I thought there would be provisions made for them to walk over there" (S.F. 311).

Petitioner takes exception to those portions of Respondent's Brief (pp. 17-19) to the effect that this type of gravel and the method of laying it were chosen for engineering reasons, citing drainage, vibration and inability to pack. This is pure speculation on Respondent's part. There was no evidence introduced on any of these matters. If those were factors to be considered, Respondent had the opportunity to bring them up at trial for the jury's consideration in arriving at their verdict. Respondent cannot now introduce evidence on appeal. Aside from that consideration, how can Respondent hide behind plans and specifications when the evidence affirmatively shows that he did not follow those plans and specifications.

Collected below are a number of similar cases in which a railroad was held negligent because of the condition of its yards.[1] This listing is representative and certainly not

[1] **Webb v. Illinois Central R.R. Co.**, 352 U.S. 512, 77 S. Ct. 451, 459, 1 L. Ed. 2d 503 (buried clinker); **Atlantic Coast Line Railroad Co. v. Gunter**, 5 Cir., 229 Fed. 2d 842 ("chunks of rock which, because they were uneven, insecure and loose, would shift and roll under the feet." Note that here too Defendant urged as a defense the contention that the roadbed had been built in accordance with

exhaustive. The jury, hearing the evidence with an opportunity to observe the witnesses and judge their demeanor and credibility, found Respondent guilty of negligence in requiring the Plaintiff to walk from the roundhouse across the yard to his engine under the circumstances and conditions then existing. This condition has been fully described and included the sizes of the gravel and the failure to tamp or pack it down. Respondent could have corrected this situation, if he did not wish to pack the gravel, by the simple expedient of making a pathway across the yards of a width in excess of the length of a box car or locomotive. Respondent could have used the same simple, inexpensive method he used when he made approximately 7,600 feet of paths for the switchmen. Other methods of transporting the engineers to their locomotives in safety were undoubtedly available.

This was the situation that faced Petitioner on the night of his injury. He had made arrangements for an automobile ride around close to the roundhouse earlier in the evening. While at his engine he was called upon to walk back across this gravel to confer with the train dispatcher by telephone about a missing brakeman (S.F. 24).

These facts were presented to the jury and the trial judge.

Petitioner does not contend that these facts state a case of negligence as a matter of law, but he does contend vig-

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good engineering practice); **Wantland v. Illinois Central Railroad Co.**, 7 Cir., 237 Fed. 2d 921 (soft and loose cinders); **McCracken v. Richmond, Fredericksburg & Potomac R. Co.**, 4 Cir., 240 Fed. 2d 484 (general condition of the ground); **Widder v. N. Y., Chicago and St. Louis Railroad Co.**, 142 Fed. Sup. 830 (W.D. Pa.) (insecure footing); **Marcades v. New Orleans Terminal Co.**, 111 Fed. Sup. 650 (E.D. La.) (four or five inch clinker in ground); and **Wiser v. Missouri-Pacific Railroad Co.**, 301 S.W. 2d 37 (clinker), and numerous authorities cited therein.

orously that they do not state a case of no negligence as a matter of law. Rather, the facts fall between these two extremes—in the province of the jury—where Petitioner has always contended this case belongs.

II.

The State Court Did Not Follow Controlling Federal Decisions.

Petitioner has never contended, either in his briefs or in his oral arguments before the Supreme Court of Texas, that negligence is not a necessary element of recovery in F. E. L. A. cases. His contention, vigorously asserted, is and has been that the decisions of the Federal Courts govern in actions brought under the Federal Employers' Liability Act and that "the *kind* or amount of evidence required to establish it (negligence) is not subject to the control of the several states". *Jesionowski v. Boston & M. R.R.*, 329 U.S. 452, 457, 67 S. Ct. 401, 91 L. Ed. 416, 169 A.L.R. 947 (emphasis added). The rights asserted by Petitioner in this case are federal rights given him by federal statute, enforced by federal rather than by local rules of law.

The Supreme Court of Texas in plain contravention of the federal decisions stated at one point:

> "We disagree with Respondent's contention that this question (what constitutes a reasonably safe place to work) is to be determined by federal decisions alone."

And again,

> "We adhere to the rule that this court in determining the question of no evidence reserves the right to ap-

praise the evidence in accordance with the concept of negligence as announced by this court in prior cases.'"

Congress did not intend that varying conceptions of negligence would give a cause of action to an employee in one state and deny that same cause of action in another state. Rather, Congress intended a uniform system to be applied in all jurisdictions. If each state reserved to itself the right to appraise the evidence in F. E. L. A. cases according to that state's decisional law, there would result 48 different shadings and colorings of negligence even though each state reasoned from the same general concept.

The concept of negligence grows and shifts constantly as courts apply the basic "reasonable man" rule to a vast variety of fact situations. Jurisdictions differ widely as they attempt to balance the law as a guide for conduct with ever changing ideas in morals and the responsibility of man to his neighbor. Even the most cursory glance at a student's negligence hornbook reveals sharply contrasting solutions to similar problems. The uniformity in result sought by the enactment of the Federal Employers' Liability Act most certainly would be defeated if each jurisdiction were given free rein to appraise the facts according to that particular jurisdiction's prior cases—even though each jurisdiction started with the same broad, basic rule.

A further detriment to uniformity of decisions is the difficulty of separating the concept of negligence from the doctrines of contributory negligence assumed risk and allied theories. Even these doctrines differ from jurisdiction to jurisdiction. Their closeness with the concept of negligence could not be better illustrated than in Respondent's Brief where he says: seeking to demonstrate his lack of re-

sponsibility for the accident: ". . . he (Petitioner) could give his undivided attention to his walking". (Respondent's Brief, page 14). Not only is this a factor not to be considered on appeal, but it seems to charge contributory negligence or assumed risk, which are not a bar to Petitioner's cause of action.

For these reasons, this Honorable Court has said that the federal decisions in F. E. L. A. cases control. If each state attempts to reserve that appraisal to itself, as the Texas court has done, the very purpose of the Federal Employers' Liability Act would be defeated.

Had the Supreme Court of Texas not expressly stated that it would review the evidence in the light of prior state cases, it would still be apparent that this is their determination from an examination of the evidence developed in trial in comparison to the evidence recited in that court's opinion. The Supreme Court of Texas did not view the evidence in the light most favorable to Petitioner, ignoring contrary evidence and inferences. Petitioner respectfully calls several additional instances to the Court's attention:

(1) A stranger to the evidence in this case, reading only the opinion of the Supreme Court of Texas, would not be aware of the wealth of testimony that the gravel used in Settegast Yards did not conform to the two-inch gravel specifications contained in the A. R. E. A. plans.

(2) A stranger to proceedings other than the Supreme Court of Texas' opinion would not be aware of the testimony of the resident engineer of the construction of Settegast Yards that "I thought there would be provisions made for them (the engineers) to walk over there" (S.F. 311).

(3) A stranger to all other proceedings would believe that A. R. E. A. specifications were followed in the construction of Settegast Yards, but direct contrary evidence was adduced upon the trial.

That the Supreme Court of Texas so evaluated the evidence is clear and ample proof that they did not follow the dictates of this Honorable Court in reviewing this evidence, just as they said they would not.

Conclusion

The Honorable Tom C. Clark, Associate Justice of the Court, said in an address before the Section of Judicial Administration, American Bar Association, Dallas, Texas, August 27, 1956, "The purpose of the establishment of one Supreme National Tribunal was in the words of Chief Justice John Rutledge, 'to secure the national rights and the uniformity of judgments.' That is our mission". Petitioner respectfully submits that he has been deprived of a federal right in a manner that will prejudice not only him but other federally protected employees and he prays that this Honorable Court grant his application for Writ of Certiorari.

Respectfully submitted,

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By Fred Parks
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STATE OF TEXAS :
COUNTY OF HARRIS :

BEFORE ME, the undersigned authority, on this day personally appeared Fred Parks, who after being by me duly sworn, upon his oath did depose and say:

"My name is Fred Parks. I am one of the attorneys of record for Jay Lee Gibson, Petitioner. On the 20th day of September, 1957, a copy of the foregoing Reply Brief for the Petitioner was mailed to the Respondent's attorneys as follows: Hutcheson, Taliaferro & Hutcheson, Esperson Building, Houston, Texas, and Woodul, Arterbury & Wren, Chronicle Building, Houston, Texas."

Fred Parks

FRED PARKS

Subscribed and Sworn to Before Me by the said Fred Parks, this the 20th day of September, 1957, to certify which witness my hand and seal of office.

Jane Love

Notary Public in and for Harris County, Texas

FILED
JUL 29 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]142

JAY LEE GIBSON, *Petitioner*,

v.

[redacted]Y A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

WOODUL, ARTERBURY & WREN
WALTER F. WOODUL
Attorneys for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1034

JAY LEE GIBSON, *Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

Respondent cannot agree with Petitioner's Statement of Questions presented. The Questions involved herein are as follows:

(1) Is there any evidence in the record to support the finding of the jury that Respondent was negligent, and if negligent, was such a proximate cause of Petitioner's injuries, in

(A) Requiring Petitioner to walk from the Roundhouse to his engine;

(B) Failing to firmly pack the Gravel about and between the tracks; and

(C) Failing to provide a smooth walkway or path from the Roundhouse across the yards to Petitioner's engine.

Another alleged act of negligence (failure of Respondent to use gravel of a uniform size) was submitted to the jury and found by the jury in favor of Petitioner. However, on appeal by Respondent to the Court of Civil Appeals, that Court held that the finding of the jury that Respondent was negligent in failing to use gravel of a uniform size was not supported by the evidence. (See page 26 of the Petition for Writ of Certiorari). Petitioner made no objection to that holding and did not file either a motion for rehearing or an application for Writ of Error. Therefore, Petitioner has not preserved any point of error with respect to that ruling by the Court of Civil Appeals. See *Shambray, et al. v. Housing Authority of City of Dallas* (Supreme Court, 1953), 255 S.W. 2d 184. As no point was preserved, there is not before this court any point involving the size of the gravel used by Respondent in the yard.

Statement of Material Facts

Petitioner - a locomotive engineer in the employ of Respondent - had operated his train into and out of Settegast Freight Yard on an average of three times a week (S.F. 14) for the six months immediately preceding the accident in question (S.F. 13). Settegast Yard is a large freight yard divided into three sections - "A", "B", and "C". There are numerous tracks in the yard and they run

in a north and south direction. (Plaintiff's Exhibit #2). Petitioner's locomotive was spotted in "C" yard, about 900 feet from the roundhouse. (S.F. p. 22). "A" and "B" yards were between the Roundhouse and "C" yard. (S.F. p. 22).

On the night in question, Petitioner first checked in at the yard office (S.F. p. 53). He then got someone to carry him in an automobile around close to the Roundhouse (S.F. p. 53). He then walked across the tracks to his engine without mishap (S.F. p. 53), with the aid of the automobile lights (S.F. p. 55). Once on the engine he made various tests in preparation for the trip. However, the conductor came to him and told him that he was wanted on the telephone (S.F. p. 55). Petitioner and the conductor then walked across the yard to the Roundhouse (S.F. p. 56). The conductor had his lantern (S.F. p. 56). After Petitioner had completed his business at the Roundhouse he started back to his engine (S.F. p. 56). It was in the course of this trip that he alleges he fell. Petitioner did not have any light to aid him on this last trip. He was in "B" yard when he fell (S.F. p. 58).

There were no witnesses to Petitioner's fall, save Petitioner himself. In order for this Honorable Court to have a clear conception of Petitioner's version of the fall, we quote, verbatim, his testimony regarding the fall. It is as follows:

> "As I was going back to the engine I was walking and zigzagging through the yard where the cars were standing, walking around where they were switching cars back and forth, kicking them down the *the* lead, to avoid those cars, and as I went back I was getting pretty close to the engine and I fell by stepping on a

round rock that slipped my foot under the web or base of the rail and it caught me because I was off balance, and I tried to pull against it, and that foot was in there tight, and this foot was in the center of the track to keep from falling, and the round gravel slid out from under me, causing me to twist as I fell. I had my gloves on and this hand went right down between the rails, with my head between the ties, and it flopped my head back to the center of my back,—it just popped, and as this knee went down I got a big gash on my knee. It was all bruised up and a gash cut in it." (S.F. p. 27)

On cross examination Respondent testified with respect to his falling as follows:

"Now, in walking back across there you had walked quite some distance before, as you explained it, you slipped on a rock?

A. Yes.

Q. Did there seem to be any difference in the feel of this rock you slipped on and any of the other rocks you had been walking over?

A. Well, yes—the only way I can explain it, Mr. Hoover, in terms of my language.

Q. Well, that is the way I want it.

A. Well, I couldn't explain it in a lawyer's language.

Q. I don't want you to.

A. All I can do is give you approximately in all of the railroad slang I know. When I slipped on that rock it shot my foot sort of quick, that was the difference in time, it was quicker, and I lost my balance by my foot going under the web of the rail, and I fought against it and I just went over.

Q. Which foot stepped on that particular rock?

A. The right foot." (S.F. pp. 58 and 59)

"Q. Had they held you pretty well in walking across the ground, had you slipped out there before?
A. The gravel did work under you, yes.
Q. It worked under your feet because it was loose?
A. Yes, sir.
Q. The difficulty, however, was when you stepped on this particular rock you slipped?
A. Well, it just shot me, just like a man would be if a calf was throwed.
Q. Did your right foot catch under the rail?
A. It went under the web of the rail. It caught my toe under the web, and it was caught by the gravel, and I couldn't get it out.
Q. Then your left foot come around?
A. Yes, I was in motion and it went in between the rails and hit, I imagine, on the tie with that little round gravel, and when it did that, that little round gravel let it go plumb out because this foot was hung and it had a pressure trying to get this one loose. It was sort of like roping a calf.
Q. You had one foot hung under the rail, and this foot went across and hit in between the rail?
A. Yes, sir.
Q. Then you fell forward?
A. Yes, sir." (S.F. pp. 60 and 61)

"Q. I believe you said you never saw the particular rock there before or after?
A. No.
Q. And the only way you can describe it is how it felt on the sole of your foot and the way it reacted when it scooted out from under you?
A. That is all I know." (S.F. pp. 67-68)

It will be noted from the foregoing excerpt that there is no contention made by Respondent that there was any depression or unevenness in the yard. The only cause of the fall was the rolling of rock upon which he stepped.

Several witnesses testified regarding the condition of the yards. We will summarize most of that testimony and only in a few instances will the witness be quoted verbatim. On this point, the Petitioner testified as follows, (narration ours):

> "The heavy gravel was awfully hard to walk on. Your feet would sink in it, it was rolling and hard to walk in. Any gravel is hard to walk in, whether there or in any place. (S.F. p. 20). When you are coming into the yards (off of a run) you can walk down the leads, which is easier than walking across the tracks. It is rougher walking across the tracks than down the tracks. (S.F. p. 51). Since this was a new yard the gravel was loose. I walked on it and all the other men walked on it." (S.F. p. 53).

> "Q. Have you seen any of the other boys fall?
> A. I wasn't looking for anybody to fall on it." (S.F. p. 53).

> "The condition in Settegast yards was different from other freight yards in that they did not have *that much* loose gravel in other yards." (S.F. p. 68).

One of petitioner's witnesses, Terry, testified that the ballast consisted of sand and rocks, but no big rocks. The largest was the size of a hen egg. (S.F. p. 96). Another of Petitioner's witnesses (O'Connell) testified that he walked over this area frequently and that a person could fall on the gravel *"if you are not careful."* He fell one night when he had on hard sole shoes and stepped on a rail.

Another of Petitioner's witnesses, Chandler, testified as follows (Narration ours):

> "Q. Would it [the gravel] support a man as he walked over it, or would he sink down?

A. Well, he would sink down as you walk.
Q. Was it easy or difficult to walk on that gravel?
A. *Quite difficult if you had any distance to go.*" (St. F. p. 150)

"This condition was not common to all the other railroad yards that I have seen. All the others have been older yards and they were gravel but *the gravel had packed more or less.* (St. F. p. 151)"

Another of Petitioner's witnesses, John B. Hill, testified as follows:

"Q. Can you tell me what they had covered the yards with?
A. Rocks.
Q. What kind of rocks were they?
A. Just big gravel.
Q. Was it a particular kind of gravel?
A. Yes, sir, just *regular railroad gravel.*" (St. F. p. 194)
"Q. How was walking out there?
A. You would walk your legs off. You got awful tired, you would take a step and slip." (St. F. p. 194)

C. R. Dubose was called as a witness by Respondent and testified as follows (Narration ours):

"My name is C. R. Dubose; I am employed by the New Orleans, Texas & Mexico Railway Company and have been since 1924 as a civil engineer. (S.F. p. 300). My work primarily involves track construction, industrial track yard design and terminal design, freight and passenger terminals. In 1948, '49 and '50 I was resident engineer on the construction of Settegast yards, here in Houston." (St.F. pp. 300-301)

"Please tell the jury something about the planning and construction of that yard.

A. Well, it was designed as a freight terminal under the A.R.E.A. specification and practice.
Q. What is the A.R.E.A.?
A. That is the American Railway Engineering Association, of which I am a member. It is primarily a freight yard and laid out on that construction.
Q. Were those plans and specifications that you followed, were those approved by the American Railway Engineers' Association?
A. Yes, that was the standard practice and specification that we followed in the design and construction of that yard.
Q. Is that Association, the A.R.E.A., is that local?
A. No, sir, it is national.
Q. Of what is it composed?
A. It is composed of railroad engineers over the United States, mostly in a supervisory capacity. To be a member of the A.R.E.A. you must meet certain qualifications by having so many years experience in this certain field, not followed by other engineers.
Q. These specifications used in the construction of that yard, was that the best thinking of engineers developed in the construction of railroad facilities?
A. That is true. The specifications and general plan are an accumulation of committee reports. We have committee reports on various phases of railroad construction, and they are compiled in the committee reports that are available to all members." (St. F. pp. 301-2)

"The Ballast used in the yards was pit run gravel. The specifications were that it must pass a 2 inch screen. It would eliminate rocks that would not pass a 2 inch screen. The first six inches of gravel was spread by draglines, and bull dozers over the entire area. (S.F. p. 303). The tracks were built on this six inches of gravel. Additional gravel was then unloaded from hopper bot-

tom cars, making 12 inches of gravel, then it was levelled off between the rails to the top of the ties. (S.F. pp. 303-4) The gravel was tamped immediately in the tracks. There was no tamping between the tracks. The only tamping along the track was by a machine. (S.F. p. 304). At that time that was the best known specifications and plans that we had to follow and we followed them. The gravel as it was put in was levelled off even with the ties. As the gravel picks up soil and dirt it becomes more solid. It is rather loose when it is put in but it acquires soil and dirt. (S.F. p. 304).

"Q. You have walked in the yard at night when the lights were on?

A. Yes, I have walked it many times. Being resident engineer I have been there many times.

Q. Tell us about the gravel after it was first installed.

A. It was pit run gravel and it was hard walking, but I wouldn't say that it was dangerous. It was just like gravel in the fill of any road, and I have walked back and forth quite a number of times through there.

Q. The lights, then, the lighting of the yard and the gravel type of construction of the yard, the method that the gravel was placed in the yard, did all of those thngs meet all of the specifications that you engineers had access to at the time?

A. To the best of our ability and knowledge at that time." (St.F. p. 306)

"In the period from June to December, the gravel would tend to sink and become more solid because as you use it and walk over it, the vibrations of the train would tend to set the gravel up more than when it was put in." (St.F. p. 307) We use gravel out of the same pit that this came from in other yards on the line to Brownsville. (St.F. p. 308)

Reply to Petitioner's Reasons for Granting the Writ

Petitioner's contention under this point that the Texas Supreme Court applied a different concept of negligence than is applied by this Court in this class of cases just is not correct. The Texas Court correctly stated the rule as follows:

> "The proper test to be applied is * * * that in determining liability were the facilities provided or was the place to work such as a person of ordinary prudence would have provided under the same or similar circumstances, having in mind the employer's duty to furnish a safe place to work. See Chicago, Great Western Railway Company v. Smith, 9th Circuit, 228 F. 2d 180. If the employer knows, or in the exercise of ordinary care should know that prevalent conditions are inadequate to protect his employees from injury, then negligence, within the meaning of the Federal Employers' Liability Act attaches. See Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. These same rules of law were followed by this court in determining the 'no evidence' question involved in the case of Hopson v. Gulf Oil Corporation, 150 Tex. 1, 237 S.W. 2d 352 (a Jones Act case).
>
> "Thus, we have federal decisions and state decisions determining 'no evidence' questions by using the same settled rules of law * * *. In holding that the record is devoid of evidence showing negligence on the part of petitioner in furnishing respondent a safe place to work, we are not unmindful of the rule that petitioner must show that reasonable minded men could not draw different inferences from the evidence. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.
>
> " * * * The Standard to test the question of negligence vel non is the common experience of mankind,

and implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case." (Pps. 44-5-6 of the Petition).

We respectfully ask the court to compare the rules applied by the Texas Court with the following Statement of the rule by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451:

> "In this situation the employer's Liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. (Baltimore P. R. Co. v. Jones, 95 U. S. 439, 442, 24 L. Ed. 506; Texas P. R. v. Barrett, 166 U.S. 617, 619, 17 S. Ct. 707, 708, 41 L. Ed. 1136; Grand Trunk R. Co. of Canada v. Ives, 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485). * * * Of course, in any case the standard of care must be commensurate to the changes of the business. Hough v. Texas & P. Ry. Co., 100 U.S. 213, 218, 25 L. Ed. 612; Cf. Northern Pac. R. Co. v. Herbert, 116 U.S. 642, 652, 6 S. Ct. 590, 595, 29 L. Ed. 755."

It is clear that the Texas Court is following the rule of "due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation" as laid down by this Court in the Tiller case, supra. Petitioner's contention in view of this is completely untenable.

Petitioner's reliance upon the *Webb* case (*Webb v. Ill. Central R. Co.*, 77 S. Ct. 451, 1 L. Ed. 503) cannot

support his position. In the *Webb* case, the plaintiff had fallen because of striking his foot against a clinker in what was otherwise a smooth walkway. It was conceded that the clinker created a hazardous condition. Certainly those facts are materially different from this case where the Petitioner fell because of the loose gravel. In fact, it is only in his application that Petitioner takes the position that the particular rock he stepped on was the cause of his injury. The Texas Court follows the rules laid down in the *Webb* case. *Hopson v. Gulf Oil Corp.*, 237 S.W. 2d 352, 150 Tex. 1, (a Jones Act case); *Texas & New Orleans Railroad Company v. Hayes*, 293 S.W. 2d 484.

The portions of the opinion of the Texas Supreme Court quoted by Petitioner were in answer to Petitioner's oral argument before that court to the effect that liability under the Act was not predicated on negligence. That argument, of course, is not valid.

The evidence which Petitioner claims is sufficient to raise a fact issue for the jury is wholly insufficient to do so.

Petitioner's insistence that gravel of a larger size than was prescribed by the specifications was used is of no assistance to him. As noted above he failed to preserve any point of error with respect to this point. However even if we assume, for the sake of argument, that Petitioner did preserve this point, there is no merit in the point. The uncontradicted testimony of Respondent's resident engineer was that gravel of 2" or less was used (S.F. p. 303). Samples of the gravel were tested to make sure that it met specifications. (S.F. pp. 308-9). Petitioner's own witness testified that the gravel used was "*just regular railroad gravel.*" (S.F. p. 194). There was no intimation of any

character that gravel of a different size or character was ever used by any other railroad company in covering its yards. The only reasonable inference to be drawn from the testimony of petitioner's witness that this was *"just regular railroad gravel"* is that gravel of this type is universally and customarily used by railroad companies for this purpose.

While it is true that there was some testimony that there was a few pieces of gravel in the large yard which exceeded 2 inches in size, such is not any evidence of negligence as to allow the petitioner a recovery. This is true for the simple reason that the presence of such rocks, if any, did not contribute to petitioner's fall. It is immaterial what rocks may have been present a few feet from petitioner. As will be noted from a reading of petitioner's testimony, he does not attribute his fall to the stepping on a large rock. He described the rock that he stepped on as about two (2") inches in diameter.

Petitioner's argument that the jury could infer that the gravel in other yards was packed is fallacious. The only reasonable inference to be drawn from petitioner's testimony that other yards that he had been in did not have that much loose gravel (S.F. p. 78) and from the testimony of petitioner's witness Chandler that *all* the other yards that he had been in were older yards and the gravel in them had *"packed down more or less"* is that a certain amount of loose gravel is a common character of freight yards. Now, if the yards had been packed and tamped, as petitioner contends, this loose gravel would not be present. It necessarily follows that the Supreme Court of Texas drew the only reasonable inference.

The statement of Respondent's resident engineer that he thought provisions would be made for the engineers to walk to their trains, wholly fails to be a basis for the jury's finding. It was only nine hundred feet from the roundhouse to the place where the engines were spotted. That distance certainly isn't too far for an able bodied man to walk. There is no intimation in the statement that any other or further facility was to be constructed for the use of petitioner.

Petitioner's complaint that other employees had been furnished with better footing is not well taken. It is well established that the standard of care must be commensurate to the danger of the business. Less diligence is required where the danger is slight than where great. *Frizzell v. Wabash R. Co.*, 9 Cir., 199 F. 2d 153. Petitioner's only concern was to walk to his engine. He had no other duties to perform while walking to his engine. He could give his undivided attention to his walking. Surely walking on unpacked gravel is not an unreasonable risk for a person who can give his undivided attention to his walking.

But compare the situation of the car inspectors (such as petitioner's witness Hill) and switchman, who because of their duties could not look where they were walking. It was for the benefit of this class of employees, who are in a materially different situation from petitioner, that the leads, where this class of employees worked, were surfaced. The fact that Respondent provided a better footing for the employees as they worked parallel with the tracks in the yard is not any evidence of negligence with respect to Petitioner. Petitioner was walking perpendicularly to the tracks, not parallel with them.

Likewise, petitioner's argument that a peculiar situation existed at Settegast Yard is without merit. There was not any area surfaced for walking across the tracks. It was a large yard and, of course, it would be necessary for all the different classes of employees to cross the track. The engineers are not entitled to any preferential or better footing than any other class.

It should be remembered that the providing of a path for petitioner to use in walking from the Roundhouse to his train was not merely the simple matter of creating a narrow path in a straight line from the Roundhouse to the engine. Since box cars and trains would be on the intervening tracks and petitioner would have to detour around them, it would be impossible to erect such pathway. To construct a special walkway for Petitioner would necessitate covering the entire yard.

There is no evidence in the record that any complaint had ever been made to respondent regarding the condition of the yard. There is no evidence that anyone in petitioner's situation had ever fallen prior to the occasion in question. Clearly the fall by petitioner's witness who fell because he stepped on a rail and the fall by petitioner's witness who fell because his duties prevented him from looking where he was stepping, are materially different situations and have no relevance as to the point under consideration. The same is true of the testimony of petitioner's witness who had seen others *stumble and fall*. Without testimony that they fell because of the gravel, such testimony is not pertinent. They may have stumbled because of stepping on a rail or by catching their foot in the cuff of their trousers.

A layman has no other alternative than to engage experts to prepare plans and specifications for the erection of the improvement he desires to build. That is exactly the procedure followed by the Respondent in this case. There is no dispute but that the American Railway Engineers Association is competent in this field. It makes studies and compiles reports regarding each phase of construction. The Respondent erected his yard in accordance with the plans and specifications prepared by that group. The law is clear that the judgment of engineers, just as the judgment of architects, is not subject to review by a jury. We quote from the case of *Louisville and N. R. Co. v. Davis* (Ct. App. 6 Cir. 1935), 75 F. 2d 849, 850 as follows:

> "*The rule is well settled that the master is not bound to use the safest and best method of contrivance to meet the legal requirement of reasonable care, and that in any event reasonable engineering and scientific judgment is not subject to review by a jury.* Baltimore & O. R. Co. v. [illegible]eger, 266 U.S. 521, 530, 45 S. Ct. 169, 69 L. Ed. 419; Toledo, St. L. & W. R. Co. v. Allen, 270 U.S. 165, 170, 48 S. Ct. 215, 72 L. Ed. 513; Delaware, L. & W. R. Co. v. Koske, 279 U.S. 7, 11, 49 S. Ct. 202, 73 L. Ed. 578; Richards v. Rough, 53 Mich. 212, 18 N.W. 785." (Emphasis ours)

And the case of *Delaware, L. & W. Ry. Co. v. Koske*, 279 U.S. 7, 73 L. Ed. 578, at p. 581 of 73 L. Ed. as follows:

> "Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. Patton v. Texas & P. R.

Co., 179 U.S. 658, 664, 45 L. Ed. 361, 364, 21 Sup. Ct. Rep. 275. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. *Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries.* Toledo, St. L. & W. R. Co. v. Allen, 276 U.S. 165, 170, 72 L. Ed. 513, 516, 48 Sup. Ct. Rep. 215.

"The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect (12) of the method employed or the condition of the drain at the time and place in question. Nelson v. Southern R. Co. 246 U.S. 253, 62 L. Ed. 699, Sup. Ct. Rep. 233; Missouri P. R. Co. v. Ashy, 275 U.S. 426, 72 L. Ed. 351, 48 Sup. Ct. Rep. 177." (Emphasis ours)

This Honorable Court may inquire as to the reasoning behind the engineers' decision to not pack the gravel. Certain factors, sufficient to show beyond a doubt that it was a question to be decided in accordance with the best engineering judgment available to Respondent, may be mentioned. Some of the more obvious factors are as follows:

(1) The matter of drainage. The freight yard is a large one and it is common knowledge that Houston, Texas, normally has a very heavy rainfall. The area under the rails

and ties had been packed. It is common knowledge that wate. will not drain through tightly packed substances. Therefore, the rain which fell on the area covered by the ties would have to drain elsewhere. The only other place is the area between the tracks. Thus the area between the tracks would have to serve as a drainage area not only for the rain which fell on this area, but also for the rain which fell on the area covered by the ties. If the area between the tracks had been packed the result would probably be that the Respondent would be charged with negligence in allowing water to stand in the yard—in having a defective drainage system.

(2) It is well known that as trains pass over the roadbed they cause the roadbed to vibrate. It may well be that if the entire area was packed these vibrations would cause the packed gravel to buckle in certain areas. This buckling would result in obstructions which would be dangerous to the employees working in the yards. The buckling would likewise cause the rails to shift and become out of line, creating the definite possibility of derailment of cars and danger to employees and property.

(3) The feasibility and method of packing. The evidence showed, without contradiction, that the first six inches of gravel was spread over the yard by bulldozers. The tracks were built on this six inches of gravel and thereafter an additional six inches of gravel was unloaded from hopper bottom cars, and this was levelled off with the ties. Now, how can the gravel in that narrow strip be packed. The plat of the yard certainly shows that the distance between the tracks is too narrow for a regular street roller to be used. (Plaintiff's exhibit # 2) There was no evidence that there was any type of machine available for this purpose.

Perhaps Petitioner will argue that all the gravel should have been packed before the tracks were laid. Let us assume for the moment that such had been done. What would be the result? The result would, of course, be that the entire tie and rail would be above the level of the gravel. Instead of the gravel being level with the ties, the ties would be protruding, resulting in a hazard to the men working in the yard. This same result would occur if it had been possible to pack the gravel after the tracks were laid. After it was packed the ties would be above it, and then they would constitute a hazard to the employees. It has been judicially determined that a railroad company is negligent in not having the space between the ties filled in. (*G.C.S.F. Ry. Co. v. Rediker* (Sup. Ct. 1886), 2 S.W. 513).

The above matters were no doubt taken into consideration by the engineers who study and design such yards as the one in question. There can be no doubt but that the matter was a decision to be made by the exercise of competent engineering judgment. *The law is clear that such is not subject to review by a jury untrained in such matters.* To hold otherwise is to allow a jury to convict a defendant of negligence upon nothing but conjecture and surmise.

We also ask the court to consider that in this case, just as in the *Koske* case, supra (279 U.S. 7), there is absolutely no evidence that the method of construction used was not suitable or appropriate or that there was in use by this defendant or any other railroad company any different method of construction of freight yards which involved any less hazard to their employees than the methods used in the instant case. There is absolutely no evidence that any other railroad company undertook to

pack the gravel in its freight yard in the area between the trac s.

Was there any reason for Respondent to anticipate injury to an employee who could give his undivided attention to his walking? Has the "Common experience of mankind" been such with reference to unpacked gravel that it gives rise to an anticipation of injury to one who walks over it? We submit that it has not been such. It is common knowledge, of which this Court can take judicial knowledge, that in the rural areas of this Country many of the public roads are gravelled. Even in the cities of this country some of the streets are gravelled. Are those roads and streets dangerous to walk upon when the gravel has not been packed or rolled? But we are not without direct evidence on this matter. We may take the experience of the employees who walked in this freight yard. Here the yard had been open approximately six months. The Petitioner himself is the only person, so far as this record shows, who had claimed that he had fallen due to gravel not being packed. (The testimony regarding a fall by stepping on a rail or by stumbling and falling are not pertinent since they involve different factual situations. The testimony of the witness Hill that he had fallen while inspecting cars is not pertinent since the Respondent would be under a duty to exercise greater care for him because the danger would be greater if one can't look where he is stepping.) It is not the anticipation that one of many will slip and fall that gives rise to an anticipation of injury. The common experience of mankind teaches us that occasionally one among many will slip and fall at a given spot regardless of the footing. (That undoubtedly is the reason why the mere happening of an accident is not any evidence of negligence. As stated by the San Antonio Court of Civil

Appeals in the case of *Camp v. J. H. Kirkpatrick Co.*, 250 S.W. 2d 413 (Writ Ref. NRE, 1950), at p. 419 ". . . the mere fact of falling does not prove the presence of danger any more than it proves clumsiness.") Rather it is the knowledge that arises where several people slip and fall at a particular spot that gives rise to an anticipation of injury. Where several have fallen the common experience of mankind teaches us that there must be some reason. While it is not unusual that one out of many may fall at a given spot it is unusual that several will fall at a given spot.

Certainly the fact that only the Petitioner of the many, many working and walking in the yard, had fallen is strong and persuasive evidence that the yard was reasonably safe for the use which Petitioner was making of it; to-wit, walking to his train.

Conclusion

The proofs in the instant case wholly fail to justify with reason the jury's conclusion that the Respondent was negligent. The Supreme Court of Texas drew the only reasonable inference possible from the evidence adduced. There is no evidence in the record from which a jury could reasonably infer that Respondent was negligent.

WHEREFORE, Premises considered, Respondent prays that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

WOODUL, ARTERBURY & WREN

WALTER F. WOODUL
Attorneys for Respondent

SUPREME COURT, U.S.
Office - Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 142

JAY LEE GIBSON, *Petitioner*

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

MOTION FOR REHEARING

WALTER F. WOODUL
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Attorneys for Respondent

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MOTION FOR REHEARING

TO THE JUDGES OF SAID HONORABLE COURT:

Comes now GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, RESPONDENT in the above styled and numbered cause and files this his motion for Rehearing and as grounds therefor would respectfully show unto the Court as follows:

I.

This Court erred in holding that "the proofs justified with reason the jury's conclusion that employer's negligence played a part in producing the petitioner's injury."

II.

This Court erred in reversing the Judgment of the Supreme Court of Texas.

III.

This Court erred in reversing the Judgment of the Supreme Court of Texas without oral argument and without proper submission of the case on the merits.

Point I Restated

This Court erred in holding that "the proofs justified with reason the jury's conclusion that employer's negligence played a part in producing the petitioner's injury."

Point II Restated

This Court erred in reversing the Judgment of the Supreme Court of Texas.

Argument

This Honorable Court by its opinion rendered herein October 21st has held that the proofs justified with reason the jury's conclusion, without stating its reasoning or pointing out the evidence which this Court considered sufficient to raise the issue. It is, of course, exceedingly difficult to point out wherein this Court erred when there is no way to ascertain what evidence or testimony this Court relied upon in making its decision.

We are firmly convinced that the theories of negligence upon which Petitioner relied are without merit. The decision to pack or not to pack the ground was one involving engineering judgment. Surely this Court is not substituting its own opinion for that of competent engineers. And surely this Court does not mean for a jury, at their whim, to upset the plans of competent engineers. To allow either result will penalize anyone who plans to erect a major improvement. Certainly in this era of technological advancement, our major industries should be encouraged to follow the direction and judgment of the respective experts, licensed engineers and architects.

The fact that there were some rocks larger than two inches in the yard is wholly immaterial since such did not contribute to Plaintiff's fall. By no stretch of the testimony could it be considered that the presence of such rocks was material in this cause. It should be remembered that Petitioner's own witness testified that the rocks were just regular railroad gravel.

Likewise, Petitioner's theory that 900 feet—not quite one-fifth of a mile—was too far for him to walk is absurd. The theory that a special path should have been built for him is without merit. Since it would be impossible to use a straight line, because of the switching on the intervening tracks, this special path would have covered the entire yard.

For a more complete answer to Petitioner's Arguments, we respectfully refer to pages ten to twenty-one of Respondent's Reply to Petitioner's Application for a Writ of Certiorari.

This Court by its decision in this case has completely changed the fundamental rule which has served this nation so well for many years. It has changed this nation from one ruled by law to one ruled by men. There is no provision in the Federal Employer's Liability Act requiring all cases to be submitted to a jury. When Congress first passed the Act and when it was last Amended, the decisions held that the trial judge's role was of meaningful significance. It seems strange that many, many years later this Court should place a different interpretation upon the Act.

The criterion for liability under the Act was fixed by Congress when it first passed the Act. That criterion has not been changed by Congress, and has been and still is, whether or not the Defendant was negligent. As Mr. Justice Harlan points out in his dissent in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, up until the decision of that case it had been required that a verdict be based upon evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. By what authority this Court undertook to change the test many years after Congress established the criterion, this Court does not state. What this Court overlooked in the *Rogers Case, Supra*, and subsequent cases, is that Congress did not strip the Defendant of the Defense that he was not negligent. On the issue of negligence, the Congress retained the Common Law standard of due care. And on the issue of negligence vel non an Action of this sort is no different from the Ordinary common law negligence action. We are certain, and we submit that this Court is convinced, that there is no evidence in this record to support a finding of negli-

gence against this Defendant, using the standard set by Congress. It should be remembered that it is the province of Congress and not this Court to set such standard. Such action on the part of this Court constitutes an unwarranted interference into the prerogatives of the Congress and establishes the prevailing notions of social justice of the Court as the standard at any given moment.

Point III Restated

This Court erred in reversing the Judgment of the Supreme Court of Texas without oral argument and without proper submission of the case on the merits.

The procedure followed by this Court in the instant case makes a mockery of the judicial system of the State of Texas. It casts aside the unanimous opinion of the nine members of the Supreme Court of Texas, reached after briefs on the merits of the case had been filed, oral argument had been heard, and the case had been carefully and thoroughly considered. The action of this Court in summarily reversing the judgment of the Supreme Court of Texas without a hearing, without the filing of briefs, except those relating to the granting of the Writ, without the printing of the record and without a full consideration of the matter is something considerably less than the standard of fair play, of which the American Judicial System prides itself.

The business which comes before this Court is of a different character than that which comes before the State Supreme Courts. The State Courts handle a greater number of negligences cases of this character than does this Court. They are more familiar with and have had a larger oppor-

tunity to become better trained with respect to the technical as well as the practical aspects of such cases than is this Court. We are firmly convinced that if this Court would give full consideration to this case, as was given by the Supreme Court of Texas, it would reach the same conclusion as did that Court and would not reverse the unanimous opinion of the Supreme Court of Texas. For a bare majority of this Court to reverse a unanimous judgment of a State Supreme Court, which is much more familiar with the issues at hand than is this Court without full consideration of the whole record and without oral argument is inconsistent with the philosophy of our jurisprudence.

In this day of widespread learning, any American of any of these United States can with pride contemplate that the members of the Supreme Court of his state are able jurists, who came as learned and trained practitioners to the bench, and it would not, today, be inept to assume that the members of the Supreme Court of Texas, from the standpoint of general knowledge, legal training, and judicial experience and concept, would compare favorably with the members of any court that ever convened in this land of ours.

FOR THIS COURT to grant a Writ of Certiorari, and on the mere application therefor to set aside the considered opinion of the Supreme Court of Texas, or of any other State of the Union, is to shake the foundation of both our state and national judicial system. To tear down the one is not to make strong the other.

WHEREFORE, premises considered, Respondent prays that this motion be granted and that the judgment rendered

herein October 21, 1957, be set aside, that the record be printed and that the cause be set down for oral argument and submission.

Respectfully submitted,

WALTER F. WOODUL

ROY L. ARTERBURY

CARROLL R. GRAHAM